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UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior Donald P. Hodel

Office of Hearings and Appeals--Paul T. Baird, Director

Office of the Solicitor-------- Ralph W. Tarr Solicitor

INDEX-DIGEST

JANUARY-MARCH 1986

This index-digest covers all the published and all the important unpublished decisions and opinions of the Department of the Interior for the period from January 1, through March 31, 1986, rendered in the Office of Hearings and Appeals, Ballston Towers, Building No. 3, 4015 Wilson Boulevard, Arlington, Va 22203 and in the Office of the Solicitor, Interior Building, 18th and C Streets, N.W., Washington, D.C. 20240.

Decisions and opinions cited as appearing in 92 I.D. are published and copies may be obtained by subscription from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Other decisions and opinions are unpublished and copies may be obtained from the Office of Hearings and Appeals or the Office of the Solicitor as provided in 43 CFR Part 2.

Editor: Rachael Cuttage;

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SYMBOLS

ANCAB - Alaska Native Claims Appeals Board
IA-T - Indian Appeals--Tort
IBCA - Interior Board of Contract Appeals
IBIA - Interior Board of Indian Appeals
IBLA - Interior Board of Land Appeals
IBSMA - Interior Board of Surface Mining Appeals
M - Solicitor's Opinion
OHA - Office of Hearings and Appeals
SEC - Office of the Secretary

ACCOUNTS

PAYMENTS

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

ACT OF JULY 17, 1914

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert D. Lanier et al., 90 IBLA 293 (Feb. 20, 1986)
93 I.D. 66

ADMINISTRATIVE AUTHORITY

GENERALLY

The Board of Land Appeals does not have authority to declare acts of Congress unconstitutional. If an enactment of Congress is in conflict with the United States Constitution, it is for the judicial branch to so declare.

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

A Bureau of Land Management instruction memorandum is merely a document for internal use by BLM employees. Such documents are not regulations and have no legal force or effect.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

ADMINISTRATIVE PRACTICE

While it is true that after a notice of appeal of a BLM decision has been filed with the Board, BLM lacks authority to modify the decision under appeal, BLM is not precluded from undertaking analyses as to the correctness of its original decision. Where the record on appeal includes a re-evaluation by the Bureau completed subsequent to the filing of an appeal concluding that areas previously designated as within a known geologic structure are not so located, such a determination cannot be ignored.

R. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

ADMINISTRATIVE PROCEDURE

GENERALLY

The regulation at 30 CFR 243.2 provides that decisions regarding payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

Marathon Oil Co., 90 IBLA 236 (Jan. 30, 1986)
93 I.D. 6

ADJUDICATION

An appeal of a decision by an Administrative Law Judge which approves a settlement agreement between the party that filed an application for review of issuance of a mine permit pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), and OSM, which issued the permit, in the absence of consent by the permittee, will be affirmed where the agreement, which includes withdrawal of the application for review, does not adversely affect any of the permittee's interests and the permittee is, therefore, no longer an interested party in the proceedings.

Peabody Coal Co. (Appellant) v. The Hopi Tribe & Office of Surface Mining Reclamation & Enforcement (Appellees), 91 IBLA 59 (Feb. 28, 1986)

ADMINISTRATIVE REVIEW

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the opening because of the potential for unnecessary degradation of cultural resources, the decision will be reversed.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

BURDEN OF PROOF

The Secretary of the Interior is authorized to consider and determine the extent of the public lands. This authority includes the authority to survey parcels conveyed from Federal ownership which border public lands. Where a Government survey of a private claim is challenged, the protestant must establish by clear and convincing evidence the survey is not an accurate portrayal of the lands conveyed.

John D. Carter, Sr., Verda H. Carter, 90 IBLA 286 (Feb. 13, 1986)

A taxpayer claiming immunity from an Indian tribal tax has the burden of proving entitlement to an exemption.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 46 (Feb. 25, 1986) 93 I.D. 79

HEARINGS

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

RULEMAKING

Under 5 U.S.C. § 552(a)(1) (1982) and the Supreme Court's holding in Morton v. Ruiz, 415 U.S. 199 (1974), an individual may not be adversely affected by a rule required to be published in the Federal Register that is not so published.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

STANDING

The intent of the regulations limiting standing to appeal to a party to the case is to afford a rational framework for administrative decisionmaking on the assumption that the initial decisionmaker will have had the benefit of the input of such a party in reaching its decision. Where a party has actively participated in the consideration of an inventory unit for eligibility as a wilderness study area has requested in writing the opportunity to comment on applications for permit to drill (APD's) filed for lands within the unit, and has been recognized by the Bureau of Land Management as a party wishing to have input in the process of adjudicating APD's filed for lands within the unit, it is entitled to notice of the filing of those APD's, and it

ADMINISTRATIVE PROCEDURE--Continued

STANDING--Continued

will be recognized as a party to the case on appeal of decisions granting APD's within the unit.

Utah Wilderness Ass'n, 91 IBLA 124 (Mar. 19, 1986)

ALASKA

ALASKA NATIVE CLAIMS SETTLEMENT ACT

Under the Alaska Native Claims Settlement Act, the key prerequisite to a village corporation's selection of land was the land's availability for withdrawal under sec. 11(a), 43 U.S.C. § 1610(a) (1982). If not so withdrawn, it could not be selected by a village corporation under sec. 12(a), 43 U.S.C. § 1611(a) (1982).

The provision "withdrawn or reserved for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), includes not only lands formally withdrawn but also embraces those lands which have been effectively reserved for such use.

The language "for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), does not create a special category of lands within those under control of the Department of Defense, but rather serves to distinguish lands held by the military from those held by other federal agencies.

Sitnasuak Native Corp., 91 IBLA 86 (Mar. 11, 1986)

LAND GRANTS AND SELECTIONS

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

NATIVE ALLOTMENTS

Prior to the adoption of ANILCA, the mere approval of a Native allotment application did not remove the Department's jurisdiction to reexamine entitlement to an allotment at any time prior to the date the "Native Allotment" is actually issued.

The legislative approval provisions of sec. 905 of ANILCA apply to Native allotment applications which were approved by BLM prior to the passage of ANILCA if the "Native Allotment" had not yet issued.

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision dismissing his protest under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest on procedural grounds.

Eugene E. Hitt, 90 IBLA 265 (Jan. 31, 1986)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Whenever the Secretary of the Interior makes any conveyance of land under any of the public land laws, he may reserve a right-of-way for trails within the National Trails System to the extent he deems necessary to carry out the purposes of the National Trails System Act, 16 U.S.C. § 1241 (1982).

The Bureau of Land Management may issue a certificate of allotment subject to a continued right of public access along a segment of the Iditarod National Historic Trail crossing through allotment lands. Such a conveyance is an exercise of the discretion vested in the Secretary pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 - 270-3 (1970).

In the absence of legislative approval of a Native allotment, title to the land in an approved allotment application rests with the United States and does not pass to the Native until the land described therein has been surveyed and a "Native Allotment" issued. Therefore, 25 CFR 169.3, which requires that the Secretary obtain written consent from Indians prior to granting a right-of-way across Indian land, does not apply to approved Native allotment applications prior to survey and issuance of the "Native Allotment."

In the absence of a dispute as to a material fact, the due process rights of an applicant for a Native allotment are satisfied by an appeal to the Board of Land Appeals.

Edward A. Nickoli, 90 IBLA 273 (Feb. 5, 1986)

The effect of a timely filed protest under sec. 905(a)(5)(C) of ANILCA is to preclude the allotment application from being subject to approval under sec. 905(a)(1) and to leave it within previously established administrative procedures to determine compliance with the Native Allotment Act.

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision approving a Native allotment application under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest for procedural reasons.

Eugene M. Witt, 90 IBLA 330 (Feb. 26, 1986)

POSSESSORY RIGHTS

Trespass cabins located within Tuxedni National Wildlife Refuge are not eligible for continued private use, and special use permits for such use may not be issued pursuant to sec. 304 of the Alaska National Lands Conservation Act of 1980. The construction and occupancy of structures in trespass upon wilderness lands confer no rights which may be asserted against the United States.

Edd J. Perry, Richard E. King, Manuel E. Donoho, 6 OHA 113 (Jan. 2, 1986)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

GENERALLY

Trespass cabins located within Tuxedni National Wildlife Refuge are not eligible for continued private use, and special use permits for such use may not be issued pursuant to sec. 304 of the Alaska National Lands Conservation Act of 1980. The construction and occupancy of structures in trespass upon wilderness lands confer no rights which may be asserted against the United States.

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ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

GENERALLY--Continued

NATIVE ALLOTMENTS

Prior to the adoption of ANILCA, the mere approval of a Native allotment application did not remove the Department's jurisdiction to reexamine entitlement to an allotment at any time prior to the date the "Native Allotment" is actually issued.

The legislative approval provisions of sec. 905 of ANILCA apply to Native allotment applications which were approved by BLM prior to the passage of ANILCA if the "Native Allotment" had not yet issued.

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision dismissing his protest under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest on procedural grounds.

Eugene M. Witt, 90 IBLA 265 (Jan. 31, 1986)

The effect of a timely filed protest under sec. 905(a)(5)(C) of ANILCA is to preclude the allotment application from being subject to approval under sec. 905(a)(1) and to leave it within previously established administrative procedures to determine compliance with the Native Allotment Act

"Improvements." As used in sec. 905(a)(5)(C) of ANILCA, the term "improvements" does not carry any special meaning, but rather has its legal meaning in relation to real property. Thus, an improvement must enhance the present value of the land.

A dirt airstrip is an improvement within the meaning of sec. 905(a)(5)(C) of ANILCA.

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision approving a Native allotment application under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest for procedural reasons.

Eugene M. Witt, 90 IBLA 330 (Feb. 26, 1986)

ALASKA NATIVE CLAIMS SETTLEMENT ACT

NATIVE LAND SELECTIONS

Village Selections

Under the Alaska Native Claims Settlement Act, the key prerequisite to a village corporation's selection of land was the land's availability for withdrawal under sec. 11(a), 43 U.S.C. § 1610(a) (1982). If not so withdrawn, it could not be selected by a village corporation under sec. 12(a), 43 U.S.C. § 1611(a) (1982).

The provision "withdrawn or reserved for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), includes not only lands formally withdrawn but also embraces those lands which have been effectively reserved for such use.

The language "for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act,

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

NATIVE LAND SELECTIONS--Continued

Village Selections--Continued

43 U.S.C. § 1610(a) (1982), does not create a special category of lands within those under control of the Department of Defense, but rather serves to distinguish lands held by the military from those held by other federal agencies

Sitnasuak Native Corp., 91 IBLA 86 (Mar. 11, 1986)

APPEALS

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of the notice of appeal is jurisdictional, and failure to file an appeal within the time allowed requires its dismissal.

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal.

Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173 (Jan. 21, 1986)

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with a district office of BLM, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Eklutna, Inc., 90 IBLA 196 (Jan. 30, 1986)

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

APPRAISALS

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred

APPRAISALS--Continued

method for determining the fair market value of non-linear rights-of-way is the comparable lease appraisal

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

BOARD OF INDIAN APPEALS

GENERALLY

The due process requirements of the Fifth Amendment to the United States Constitution are met through the administrative review afforded by the Board of Indian Appeals.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 86 (Feb. 25, 1986) 93 I.D. 79

JURISDICTION

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

The Board of Indian Appeals is not the proper forum in which to challenge a tribal ordinance as being violative of the guarantee of equal protection of the laws as provided in the Indian Civil Rights Act.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 86 (Feb. 25, 1986) 93 I.D. 79

The Board of Indian Appeals has jurisdiction over decisions issued by Bureau of Indian Affairs officials under Chapter I of 25 CFR. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies

Vance Gillette, Margaret S. Wilson, & Frank Talker v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 14 IBIA 71 (Feb. 26, 1986)

BOARD OF LAND APPEALS

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The Board of Land Appeals has well established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co.; the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against

BOARD OF LAND APPEALS--Continued

the Government must be based upon affirmative misconduct.

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

BUREAU OF INDIAN AFFAIRS

ADMINISTRATIVE APPEALS

Generally

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

The Bureau of Indian Affairs and its officials are subject to the limitations imposed on the Federal Government by the United States Constitution.

The due process requirements of the Fifth Amendment to the United States Constitution are met through the administrative review afforded by the Board of Indian Appeals

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 46 (Feb. 25, 1986) 93 I.D. 79

Except as otherwise specified, the use of Secretarial authority delegated to Bureau of Indian Affairs' agency superintendents is subject to the administrative review procedure set forth in 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

Jacqueline Parsons v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 79 (Mar. 14, 1986)

Filing

Mandatory Time Limit

Regulations promulgated by the Bureau of Indian Affairs in 25 CFR 2.10 establish a 30-day period for filing notices of appeal.

Jacqueline Parsons v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 79 (Mar. 14, 1986)

BUREAU OF LAND MANAGEMENT

The Bureau of Land Management may properly issue a notice of an incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations for each calendar month, beginning with the month in which drilling operations were initiated.

Sunset Oil Co., Inc., 91 IBLA 137 (Mar. 24, 1986)

COAL LEASES AND PERMITS

APPLICATIONS

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and, thus, is a protest.

When one files a coal lease application citing the leasing on application regulations in 43 CFR Subpart 3425, but in a subsequent submission declares that he will be using the coal for domestic energy needs, a conflict arises because one seeking coal for such a use must acquire a license to mine in accordance with 43 CFR Subpart 3440.

Randall J. Gerlach, 90 IBLA 338 (Feb. 26, 1986)

LEASES

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms. Terms and conditions which are mandated by statute and regulation or are necessary for proper administration of public lands must be included in a readjusted lease.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

Gulf Oil Corp., The Pittsburgh & Midway Coal Mining Co., 91 IBLA 93 (Mar. 13, 1986)

READJUSTMENT

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms. Terms and conditions which are mandated by statute and regulation or are necessary for proper administration of public lands must be included in a readjusted lease.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and

COAL LEASES AND PERMITS--Continued

READJUSTMENT--Continued

conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

Gulf Oil Corp., The Pittsburgh & Midway Coal Mining Co., 91 IBLA 93 (Mar. 13, 1986)

COLOR OR CLAIM OF TITLE

APPLICATIONS

BLM may properly reject a color-of-title application filed pursuant to sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the document relied upon as initiating color of title does not on its face purport to convey the claimed land, regardless of whether a contemporaneous county survey included the land in the conveyance and claimant has subsequently occupied the land.

Dale F. Pattig, 90 IBLA 323 (Feb. 25, 1986)

DESCRIPTION OF LAND

BLM may properly reject a color-of-title application filed pursuant to sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the document relied upon as initiating color of title does not on its face purport to convey the claimed land, regardless of whether a contemporaneous county survey included the land in the conveyance and claimant has subsequently occupied the land.

Dale F. Pattig, 90 IBLA 323 (Feb. 25, 1986)

COMMUNICATION SITES

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

CONSTITUTIONAL LAW

GENERALLY

The Bureau of Indian Affairs and its officials are subject to the limitations imposed on the Federal Government by the United States Constitution.

The due process requirements of the Fifth Amendment to the United States Constitution are met through the administrative review afforded by the Board of Indian Appeals.

A tax ordinance passed by an Indian tribe does not unduly burden interstate commerce if it applies to an

CONSTITUTIONAL LAW--Continued

GENERALLY--Continued

activity with a substantial nexus with the tribe, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the tribe.

Constitutional proscriptions, such as those contained in the Fifth and Fourteenth Amendments to the United States Constitution, that limit the exercise of Federal and state governmental powers, are not applicable to Indian tribes except to the extent they are explicitly endorsed by a tribal constitution or imposed by Congress.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 86 (Feb. 25, 1986) 93 I.D. 79

The Board of Land Appeals does not have authority to declare acts of Congress unconstitutional If an enactment of Congress is in conflict with the United States Constitution, it is for the judicial branch to so declare.

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

DUE PROCESS

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

In the absence of a dispute as to a material fact, the due process rights of an applicant for a Native allotment are satisfied by an appeal to the Board of Land Appeals.

Edward A. Nickoli, 90 IBLA 273 (Feb. 5, 1986)

The text of FLPMA itself provides a mining claimant with effective notice of the annual filing requirements. Individualized notices of filing deadlines are not required by the Constitution.

Thurman Oil & Mining Co., 90 IBLA 342 (Feb. 26, 1986)

CONTESTS AND PROTESTS

GENERALLY

Prior to the adoption of ANILCA, the mere approval of a Native allotment application did not remove the Department's jurisdiction to reexamine entitlement to an allotment at any time prior to the date the "Native Allotment" is actually issued.

The legislative approval provisions of sec. 905 of ANILCA apply to Native allotment applications which were approved by BLM prior to the passage of ANILCA if the "Native Allotment" had not yet issued.

Eugene R. Witt, 90 IBLA 265 (Jan. 31, 1986)

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

The effect of a timely filed protest under sec. 905(a) (5) (C) of ANILCA is to preclude the allotment application from being subject to approval under sec. 905(a) (1) and to leave it within previously established administrative procedures to determine compliance with the Native Allotment Act.

Ramona H. Hitt, 90 IBLA 330 (Feb. 26, 1986)

CONTRACTS

CONSTRUCTION AND OPERATION

Actions of Parties

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the joint spacing of the pipe at the expense of maintaining the pipe grade requirement.

Appeal of Western Contracting Corp., IBCA-1961 (Mar. 6, 1986)

Allowable Costs

Except for correction of a mathematical error in the contracting officer's decision, a contractor's claim for additional settlement costs under an architect-engineer contract terminated for the convenience of the Government is denied, where the appellant failed to show by a preponderance of the evidence that a submission schedule contained in the contract should not be used in determining the amount of the termination settlement to which the contractor is entitled. The appellant also failed to substantiate the amount claimed as subcontractor settlement costs.

PKW, Inc., IBCA-1942 (Jan. 23, 1986)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Allowable Costs--Continued

Where, in the context of a $26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brinderson Corp., IBCA-1818 (Jan. 31, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

A contractor's claims for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal officer to justify making any adjustments other than already allowed by the contracting officer.

Rechtold Construction Co., Inc., IBCA-1660-3-83 et al. (Mar. 13, 1986)

The Board finds disallowed costs under a cost-reimbursement contract with an educational institution to be allowable where additional documentation provided the contracting officer indicated that the disallowances resulted from occasional lapses, errors, or omissions in an otherwise accurate accounting system and that the contracting officer had not exercised his independent judgment to review such evidence respecting costs questioned by the auditor

Appeal of Louisiana State University, IBCA-2057 (Mar. 21, 1986) 93 I.D. 139

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is not expressly included, or is arguably inadequately included, in the specific pay items of the contract.

Ball, Ball & Brosamer, Inc., & Ball & Brosamer (JV), IBCA-1566-3-82 (Mar. 25, 1986) 93 I.D. 144

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive to accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.705-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 8 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 8-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside duals and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting soil-cement outside the 8-foot width shown on the

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or the semi-pervious portion of the inclined bank) as slippery or slick.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

Under a dam rehabilitation contract containing unit prices for construction items, where the Government claims it is entitled to a downward equitable adjustment on change order work but fails to offer any persuasive evidence in support of the revised unit prices contended for, the Board finds that the Government has failed to sustain its burden of proof.

A. D. Rossi Corp., IBCA-1923 (Feb. 27, 1986) 93 I.D. 92

Where a contractor sufficiently identified specific delays in the Government's responses to requests for change orders, the Board held that the contractor was entitled to a 337-day extension of the contract performance time even though there were other delays for which the Government and the contractor were concurrently responsible and other delays for which the contractor was solely responsible.

Appeal of Wickham Contracting Co., Inc., IBCA-1301--79 (Mar. 31, 1986)

Construction Against Drafter

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Construction Against Drafter--Continued

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

Contract Clauses

Where, in the context of a $26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brinderson Corp., IBCA-1814 (Jan. 31, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is not expressly included, or is arguably inadequately included, in the specific pay items of the contract.

Ball, Ball & Brosamer, Inc., & Ball & Brosamer (JV), IBCA-1566-3-82 (Mar. 25, 1986) 93 I.D. 144

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contracting Officer

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

Termination of a tree-thinning contract for default was held to be improper because the Government's failure to discharge its bid-verification responsibilities warranted rescission of the contract. The Board found that the actions of the parties constituted "mutual fault," where the contractor abandoned performance of the work in a case involving an admitted mistake in judgment in bidding the contract, the contracting officer failed to request verification of the bid price in light of the wide range of bids received, and the disparity between the contract bid price and the Government's estimate for the work.

Appeal of Ron Simpson, IBCA-2058 (Feb. 24, 1986) 93 I.D. 76

The Board finds disallowed costs under a cost-reimbursement contract with an educational institution to be allowable where additional documentation provided the contracting officer indicated that the disallowances resulted from occasional lapses, errors, or omissions in an otherwise accurate accounting system and that the contracting officer had not exercised his independent judgment to review such evidence respecting costs questioned by the auditor.

Appeal of Louisiana State University, IBCA-2057 (Mar. 21, 1986) 93 I.D. 139

Contractor

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is not expressly included, or is arguably inadequately included, in the specific pay items of the contract.

Ball, Ball & Brosamer, Inc., & Ball & Brosamer (JV), IBCA-1566-3-82 (Mar. 25, 1986) 93 I.D. 144

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Differing Site Conditions (Changed Conditions)

A contractor's claims for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal officer to justify making any adjustments other than already allowed by the contracting officer.

Archbold Construction Co., Inc., IBCA-1660-3-83 et al. (Mar. 13, 1986)

Drawings and Specifications

Where, in the context of a $26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brinderson Corp., IBCA-1814 (Jan. 31, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the joint spacing of the pipe at the expense of maintaining the pipe grade requirement.

Appeal of Bantam Contracting Corp., IBCA-1961 (Mar. 6, 1986)

Duration of Contract

Where a contractor sufficiently identified specific delays in the Government's responses to requests for change orders, the Board held that the contractor was entitled to a 337-day extension of

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Duration of Contract--Continued

the contract performance time even though there were other delays for which the Government and the contractor were concurrently responsible and other delays for which the contractor was solely responsible.

When the Board found that a contractor was entitled to additional contract performance time as a result of Government-caused delays, it was not permissible to impose liquidated damages prior to the end of the additional period of performance which extended to the date of beneficial occupancy. The Government estimated that 5 percent of the contract work remained at beneficial occupancy, which made that event the equivalent of substantial completion. The Board follows the rule that liquidated damages may not be imposed after substantial completion so the entire amount of liquidated damages was rescinded

Appeal of Bickham Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

General Rules of Construction

Where, in the context of a $26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brinderson Corp., IBCA-1814 (Jan. 31, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is not expressly included, or is arguably inadequately included, in the specific pay items of the contract

Ball, Ball & Brosamer, Inc., & Ball & Brosamer (JV), IBCA-1566-3-82 (Mar. 25, 1986) 93 I.D. 18

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Impact of Parties

Except for correction of a mathematical error in the contracting officer's decision, a contractor's claim for additional settlement costs under an architect-engineer contract terminated for the convenience of the Government is denied, where the appellant failed to show by a preponderance of the evidence that a submission schedule contained in the contract should not be used in determining the amount of the termination settlement to which the contractor is entitled. The appellant also failed to substantiate the amount claimed as subcontractor settlement costs.

PEB, Inc., IBCA-1902 (Jan. 23, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

Waiver and Estoppel

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

CONTRACT DISPUTES ACT OF 1978

Interest

Where a contract settlement arrived at pursuant to a termination for the convenience of the Government expressly omits any provision for the payment of interest on the amount of the agreement, the contractor is entitled to interest on the settlement amount from the date of its certification of the claim until the date payment of the settlement amount is made, notwithstanding the provisions of 41 CFR 1-8.212-2(c) (1981) and

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Interest--Continued

subsequent similar provisions which preclude interest on normal termination settlements.

Power City Construction, Inc., IBCA-1839 (Mar. 12, 1986) 93 I.D. 131

Jurisdiction

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

A claim presented for the first time in the Complaint is dismissed since under the Contract Disputes Act of 1978 the presentation of a claim to the contracting officer for decision is a prerequisite to the Board exercising its appellate jurisdiction.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

In a case where an Indian tribe moves to dismiss appeals for lack of jurisdiction in the Board where the Government claims for repayment of disallowed costs under cost-reimbursement contracts, the Board finds the Contract Disputes Act of 1978 to be inapplicable to contracts awarded under Public Law 93-638, but finds the Board has jurisdiction under a delegation of authority from the Secretary and the agreement of the parties under a disputes clause in the contracts. The claim of sovereign immunity by the tribe is found to relate to enforcement of any decision finding the tribe liable to the Government, and does not affect Board jurisdiction over the claims.

Appeals of Papago Indian Tribe of Arizona, IBCA-1962 & 1966 (Mar. 17, 1986) 93 I.D. 130

DISPUTES AND REMEDIES

Generally

Where a contract settlement arrived at pursuant to a termination for the convenience of the Government expressly omits any provision for the payment of interest on the amount of the agreement, the contractor is entitled to interest on the settlement amount from the date of its certification of the claim until the date payment of the settlement amount is made, notwithstanding the provisions of 41 CFR 1-8.212-2(c) (1981) and

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Appeals--Continued

subsequent similar provisions which preclude interest on normal termination settlements.

Power City Constructors, Inc., IBCA-1899 (Mar. 12, 1986) 93 I.B. 133

Burden of Proof

Except for correction of a mathematical error in the contracting officer's decision, a contractor's claim for additional settlement costs under an architect-engineer contract terminated for the convenience of the Government is denied, where the appellant failed to show by a preponderance of the evidence that a submission schedule contained in the contract should not be used in determining the amount of the termination settlement to which the contractor is entitled. The appellant also failed to substantiate the amount claimed as subcontractor settlement costs.

FEB, Inc., IBCA-1982 (Jan. 23, 1986)

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.205-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 8 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 8-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside faces and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting soil-cement outside the 8-foot width shown on the plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concurred with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or the semi-pervious portion of the inclined bank) as slippery or slick.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

A claim against a contractor for damages asserted under the Termination For Default--Damages For Delay--Time Extension Clause is sustained when the contractor failed or refused to complete the work covered by a mop-up and fireline services contract and the amount charged against the contractor for completion of the work remaining with Government forces represents a reasonable measure of the damages sustained by the Government as a result of the contractor's failure to complete the contract work.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

Upon finding that a notice of award was signed by the contracting officer and mailed to the contractor on the same day that the contractor mailed a notice of mistake in bid, including a request to withdraw the bid, to the contracting officer; that both documents were received by the respective addressees on the same day, five days later; that the bid form provided for acceptance by mailing or otherwise furnished within a specified time; and that the contracting officer was in good faith accepting the bid and had no apparent reason to suspect that a bid mistake had been made; the Board holds: that the contractor has failed to sustain its burden of proof to establish entitlement to relief from the mistake, since the law is well settled that a notice of award is effective on the date mailed--if mailing is permitted by the bid document--constitutes an acceptance of an offer, and results in a binding contract; while a notice of mistake in bid and request for withdrawal constitutes an attempt to withdraw an offer to form a contract, or rescind a contract already made, and is not effective until received by the offeree--the contracting officer.

Singleton Contracting Corp., IBCA-1770-1-84 (Mar. 6, 1986) 93 I.D. 127

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

joint spacing of the pipe at the expense of maintaining the pipe grade requirement.

Appeal of Western Contracting Corp., IBCA-1961 (Mar. 6, 1986)

A contractor's claims for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal officer to justify making any adjustments other than already allowed by the contracting officer.

Rechtold Construction Co., Inc., IBCA-1660-9-87 et al. (Mar. 13, 1986)

Damages

Actual Damages

A claim against a contractor for damages asserted under the Termination For Default--Damages For Delay--Time Extension Clause is sustained when the contractor failed or refused to complete the work covered by a sap-up and fireline services contract and the amount charged against the contractor for completion of the work remaining with Government forces represents a reasonable measure of the damages sustained by the Government as a result of the contractor's failure to complete the contract work.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

Liquidated Damages

When the Board found that a contractor was entitled to additional contract performance time as a result of Government-caused delays, it was not permissible to impose liquidated damages prior to the end of the additional period of performance which extended to the date of beneficial occupancy. The Government estimated that 5 percent of the contract work remained at beneficial occupancy, which made that event the equivalent of substantial completion. The Board follows the rule that liquidated damages may not be imposed after substantial completion so the entire amount of liquidated damages was rescinded.

Appeal of Pichhan Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

Equitable Adjustments

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive to accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.205-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 8 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it could have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 8-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside duals and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting soil-cement outside the 8-foot width shown on the plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or the semi-pervious portion of the inclined bank) as slippery or slick.

Riverside General Contractors, Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional processing costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

Under a dam rehabilitation contract containing unit prices for construction items, where the Government claims it is entitled to a downward equitable adjustment on change order work but fails to offer any persuasive evidence in support of the revised unit prices contended for, the Board finds that the Government has failed to sustain its burden of proof.

A. D. Rossi Corp., IBCA-1923 (Feb. 27, 1986)
93 I.D. 92

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the joint spacing of the pipe at the expense of maintaining the pipe grade requirement.

Appeal of Western Contracting Corp., IBCA-1961 (Mar. 6, 1986)

A contractor's claims for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal officer to justify making any adjustments other than already allowed by the contracting officer.

Bechtold Construction Co., Inc., IBCA-1660-3-83 et al. (Mar. 13, 1986)

Jurisdiction

A claim presented for the first time in the Complaint is dismissed since under the Contract Disputes Act of 1978 the presentation of a claim to the contracting officer for decision is a prerequisite to the Board exercising its appellate jurisdiction.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Jurisdiction--Continued

In a case where an Indian tribe moves to dismiss appeals for lack of jurisdiction in the Board where the Government claims for repayment of disallowed costs under cost-reimbursement contracts, the Board finds the Contract Disputes Act of 1978 to be inapplicable to contracts awarded under Public Law 93-638, but finds the Board has jurisdiction under a delegation of authority from the Secretary and the agreement of the parties under a disputes clause in the contracts. The claim of sovereign immunity by the tribe is found to relate to enforcement of any decision finding the tribe liable to the Government, and does not affect Board jurisdiction over the claim.

Appeals of Papago Indian Tribe of Arizona, IBCA-1962 & 1966 (Mar. 17, 1986)
93 I.D. 136

Substantial Evidence

Where, in the context of a $26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Briadgeport Corp., IBCA-1818 (Jan. 31, 1986)

Termination for Convenience

Imposition of excess costs for a reprocurement depend on the validity of the default termination and where the Board found that the Government's attempt to reestablish a completion date was unreasonable pursuant to the DeVito rule, the termination for default was converted to a termination for convenience and the imposition of excess costs was rescinded.

Appeal of Nicklas Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

Termination for Default

Generally

Termination of a tree-thinning contract for default was held to be improper because the Government's failure to discharge its bid-verification responsibilities warranted rescission of the contract. The Board found that the actions of the parties constituted "mutual fault," where the contractor abandoned performance of the work in a case involving an admitted mistake in judgment in bidding the contract, the contracting officer failed to request verification of the bid price in light of the wide range of bids received, and the disparity between the contract bid price and the Government's estimate for the work.

Appeal of Don Simmons, IBCA-2058 (Feb. 28, 1986)
93 I.D. 76

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Terminations for Default--Continued

Excess Costs

Imposition of excess costs for a reprocurement depend on the validity of the default termination and where the Board found that the Government's attempt to reestablish a completion date was unreasonable pursuant to the DeVito rule, the termination for default was converted to a termination for convenience and the imposition of excess costs was rescinded.

Appeal of Richbar Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

FORMATION AND VALIDITY

Bid Award

Upon finding that a notice of award was signed by the contracting officer and mailed to the contractor on the same day that the contractor mailed a notice of mistake in bid, including a request to withdraw the bid, to the contracting officer; that both documents were received by the respective addressees on the same day, five days later; that the bid form provided for acceptance by mailing or otherwise furnished within a specified time; and that the contracting officer was in good faith accepting the bid and had no apparent reason to suspect that a bid mistake had been made; the Board holds: that the contractor has failed to sustain its burden of proof to establish entitlement to relief from the mistake, since the law is well settled that a notice of award is effective on the date mailed--if mailing is permitted by the bid document--constitutes an acceptance of an offer, and results in a binding contract; while a notice of mistake in bid and request for withdrawal constitutes an attempt to withdraw an offer to form a contract, or rescind a contract already made, and is not effective until received by the offeree--the contracting officer.

Singleton Contracting Corp., IBCA-1770-1-84 (Mar. 6, 1986) 93 I.D. 127

Mistakes

Upon finding that a notice of award was signed by the contracting officer and mailed to the contractor on the same day that the contractor mailed a notice of mistake in bid, including a request to withdraw the bid, to the contracting officer; that both documents were received by the respective addressees on the same day, five days later; that the bid form provided for acceptance by mailing or otherwise furnished within a specified time; and that the contracting officer was in good faith accepting the bid and had no apparent reason to suspect that a bid mistake had been made; the Board holds: that the contractor has failed to sustain its burden of proof to establish entitlement to relief from the mistake, since the law is well settled that a notice of award is effective on the date mailed--if mailing is permitted by the bid document--constitutes an acceptance of an offer, and results in a binding contract; while a notice of mistake in bid and request for withdrawal constitutes an attempt to withdraw an offer to form a contract, or rescind a contract already made, and is not effective until received by the offeree--the contracting officer.

Singleton Contracting Corp., IBCA-1770-1-84 (Mar. 6, 1986) 93 I.D. 127

CONTRACTS--Continued

PERFORMANCE OR DEFAULT

Computation of Performance

A claim against a contractor for damages asserted under the Termination For Default--Damages For Delay--Time Extension Clause is sustained when the contractor failed or refused to complete the work covered by a cop-up and fireline services contract and the amount charged against the contractor for completion of the work remaining with Government forces represents a reasonable measure of the damages sustained by the Government as a result of the contractor's failure to complete the contract work.

Appeal of Channing Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

Excusable Delays

Where a contractor sufficiently identified specific delays in the Government's responses to requests for change orders, the Board held that the contractor was entitled to a 337-day extension of the contract performance time even though there were other delays for which the Government and the contractor were concurrently responsible and other delays for which the contractor was solely responsible.

Appeal of Richbar Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

Release and Settlement

Where a contract settlement arrived at pursuant to a termination for the convenience of the Government expressly omits any provision for the payment of interest on the amount of the agreement, the contractor is entitled to interest on the settlement amount from the date of its certification of the claim until the date payment of the settlement amount is made, notwithstanding the provisions of 41 CFR 1-8.212-2(c) (1981) and subsequent similar provisions which preclude interest on normal termination settlements.

Power City Construction, Inc., IBCA-1839 (Mar. 12, 1986) 93 I.D. 131

DESERT LAND ENTRY

APPLICATIONS

A decision rejecting a desert land entry application will be affirmed where the applicant proposes to irrigate his entry from underground water sources but fails to show that he has acquired a right from the state to appropriate underground water or that he is qualified under state law to obtain the necessary right to appropriate water.

Richard H. Greener, 91 IBLA 205 (Mar. 31, 1986)

WATER RIGHT

A decision rejecting a desert land entry application will be affirmed where the applicant proposes to irrigate his entry from underground water sources but fails to show that he has acquired a right from the state to appropriate underground water or that he is qualified under state law to obtain the necessary right to appropriate water.

Richard H. Greener, 91 IBLA 205 (Mar. 31, 1986)

ESTOPPEL

The Department does not have an affirmative duty to immediately adjudicate a mining claimant's recordation filings made pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976.

Paul Baillant et al., 90 IBLA 209 (Jan. 30, 1986)

Estoppel will not lie against the United States where there is no evidence of affirmative misrepresentation or concealment of material fact by the Government.

B. F. Killian, 90 IBLA 378 (Feb. 27, 1986)

The Board of Land Appeals has well established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co.; the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

Plantiger Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

EXCHANGES OF LAND

GENERALLY

Under certain circumstances a document styled as a protest is properly treated as an appeal. Thus, where prior to completion of a private exchange by BLM, the owner of the mineral interest in the private land involved therein requests that BLM acquire its interest and BLM proceeds to complete the exchange and subsequently deny the request, a protest filed by the owner should be treated by BLM as an appeal of its denial and the case file forwarded to the Board of Land Appeals.

A surface-only private exchange undertaken pursuant to sec. 11 of the Relocation Act, 25 U.S.C. § 640d-10(a)(1) (1982), over the objection of the owner of the mineral interest in the private land involved in the exchange does not violate that Act. The Act imposes no legal requirement on the Secretary of the Interior to acquire such interest.

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 640d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchange, the opportunity to consent, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

EXCHANGES OF LAND--Continued

GENERALLY--Continued

A BLM decision to proceed with a proposed land exchange of public land containing wetlands and situated within a floodplain pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), as consistent with the public interest, will be vacated and remanded where the record shows that BLM did not consider including in the deed of conveyance a requirement to preserve the beneficial values of the floodplain consistent with Executive Order No. 11988 and BLM floodplain guidelines.

Bundibuyro Ranches, Inc., et al., 90 IBLA 360 (Feb. 27, 1986)

FEDERAL EMPLOYEES AND OFFICERS

AUTHORITY TO BIND GOVERNMENT

Reliance on erroneous information provided by a BLM employee cannot relieve the owner of an unpatented mining claim of an obligation imposed by statute, create rights not authorized by law, or relieve the claimant of the consequences imposed by the statute for failure to comply with its requirements.

Thurman Oil & Mining Co., 90 IBLA 382 (Feb. 26, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

GENERALLY

The purposes of applying FLPMA's filing provisions to claims located before the Act was passed--to rid Federal lands of stale mining claims and to provide for centralized collection by Federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims--are clearly legitimate and, therefore, application of these provisions to claims located prior to FLPMA is permissible.

Thurman Oil & Mining Co., 90 IBLA 382 (Feb. 26, 1986)

CALIFORNIA DESERT CONSERVATION AREA

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the opening because of the potential for unnecessary degradation of cultural resources, the decision will be reversed.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

CORRECTION OF CONVEYANCE DOCUMENTS

Where one holding a patent from the United States applies to have the patent corrected to eliminate a reservation in accordance with sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), alleging that the purpose for the reservation no longer exists, the application is

CORRECTION OF CONVEYANCE DOCUMENTS--Continued

properly rejected where the record shows the reservation was not erroneously included in the patent on the basis of a mistake of fact.

Bill G. Hinton, Marylee Hinton, 91 IBLA 108 (Mar. 14, 1986)

DISCLAIMERS OF INTEREST

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert T. Lanier et al., 90 IBLA 293 (Feb. 20, 1986) 93 I.D. 66

EXCHANGES

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 640d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchanges, the opportunity to comment, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

A BLM decision to proceed with a proposed land exchange of public land containing wetlands and situated within a floodplain pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), as consistent with the public interest, will be vacated and remanded where the record shows that BLM did not consider including in the deed of conveyance a requirement to preserve the beneficial values of the floodplain consistent with Executive Order No. 11988 and BLM floodplain guidelines.

Sandhouse Ranches, Inc., et al., 90 IBLA 360 (Feb. 27, 1986)

LAND USE PLANNING

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant

LAND USE PLANNING--Continued

factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the opening because of the potential for unnecessary degradation of cultural resources, the decision will be reversed.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM

Issuance of a patent to a state without mineral reservation removes the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Alaska Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

Failure by mining claimants to timely record the location notice of a placer claim located prior to 1976 resulted in the invalidation of their placer claim pursuant to provision of sec. 314 of the Federal Land Policy and Management Act of 1976. The filing of assessment affidavits for invalid lode claims located over the placer claim could not operate to avoid the filing requirements of the Act.

Paul Vaillant et al., 90 IBLA 289 (Jan. 30, 1986)

Instruments required to be filed with BLM by 43 U.S.C. § 1744(a) (1982), must identify the claim or claims for which they are filed by giving the correct claim name, the correct BLM assigned claim number, or a description of each claim sufficient to locate it on the ground.

Arley Taylor, 90 IBLA 313 (Feb. 25, 1986)

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), where the owner fails to timely file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 30 of the calendar year following the first filing of such evidence or notice.

Thurman Oil & Mining Co., 90 IBLA 342 (Feb. 26, 1986)

Failure to file affidavits of assessment work prior to Dec. 31 as required by 43 U.S.C. § 1744(a) (1982), constitutes abandonment of the claims and they may be declared void by BLM.

An owner of a millsite must be given notice of a filing deficiency and an opportunity to make corrections before the site may be deemed void for failure to comply with the requirement of 43 U.S.C. § 1744(a) (1982).

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT

The Department does not have an affirmative duty to immediately adjudicate a mining claimant's recordation filings made pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976.

Paul Paillant et al., 90 IBLA 249 (Jan. 30, 1986)

The statutes and regulations governing the description of a mining claim given in a location certificate filed for recordation with BLM do not require that the locator submit information sufficiently accurate for BLM to determine the precise position of the claim on a township plat. Rather, the proper test is whether the claim may, in fact, be found and identified on the ground by following the information in the recorded description.

Arlen Taylor, 90 IBLA 313 (Feb. 25, 1986)

The purposes of applying FLPMA's filing provisions to claims located before the Act was passed--to rid Federal lands of stale mining claims and to provide for centralized collection by Federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims--are clearly legitimate and, therefore, application of these provisions to claims located prior to FLPMA is permissible.

The text of FLPMA itself provides a mining claimant with effective notice of the annual filing requirements. Individualized notices of filing deadlines are not required by the Constitution.

Thurman Oil & Mining Co., 90 IBLA 382 (Feb. 26, 1986)

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

John J. Ray, 91 IBLA 141 (Mar. 24, 1986)

RIGHTS-OF-WAY

BLM properly requires the municipal holder of a right-of-way for a water treatment plant to pay fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

"Municipal utility." A municipal utility is a political subdivision or agency of a political subdivision which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service.

City of Redding, 91 IBLA 82 (Mar. 11, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), authorizes the Secretary of the Interior to charge less than fair market value for right-of-way rental. However, a for profit business whose principal source of revenue results from subleasing communication facilities is not entitled to a reduction or waiver of a rental fee based on fair market value merely by providing a service to Government agencies or representatives of Government agencies.

Jim Doscias, 91 IBLA 131 (Mar. 20, 1986)

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management to prohibit wind energy development within the Table Mountain Area of Critical Environmental Concern will be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest. An application for a right-of-way for a wind energy project will be rejected where lands described therein are not available for development.

Kenneth E. Bosley, Boatwind Electric, Inc., 91 IBLA 172 (Mar. 26, 1986)

WILDERNESS

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the opening because of the potential for unnecessary degradation of cultural resources, the decision will be reversed.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The intent of the regulations limiting standing to appeal to a party to the case is to afford a rational framework for administrative decisionmaking on the assumption that the initial decisionmaker will have had the benefit of the input of such a party in reaching its decision. Where a party has actively participated in the consideration of an inventory unit for eligibility as a wilderness study area has requested in writing the opportunity to comment on applications for permit to drill (APD's) filed for lands within the unit, and has been recognized by the Bureau of Land Management as a party wishing to have input in the process of adjudicating APD's filed for lands within the unit, it is entitled to notice of the filing of those APD's, and it will be recognized as a party to the case on appeal of decisions granting APD's within the unit.

Utah Wilderness Ass'n, 91 IBLA 124 (Mar. 19, 1986)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

GENERALLY

The regulation at 30 CFR 243.2 provides that decisions regarding payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

Marathon Oil Co., 90 IBLA 236 (Jan. 30, 1986)
93 I.D. 6

FEES

BLM properly requires the municipal holder of a right-of-way for a water treatment plant to pay fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

City of Redding, 91 IBLA 82 (Mar. 11, 1986)

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), authorizes the Secretary of the Interior to charge less than fair market value for right-of-way rental. However, a for profit business whose principal source of revenue results from subleasing communication facilities is not entitled to a reduction or waiver of a rental fee based on fair market value merely by providing a service to Government agencies or representatives of Government agencies.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

FISH AND WILDLIFE SERVICE

Trespass cabins located within Tuxedni National Wildlife Refuge are not eligible for continued private use, and special use permits for such use may not be issued pursuant to sec. 304 of the Alaska National Lands Conservation Act of 1980. The construction and occupancy of structures in trespass upon wilderness lands confer no rights which may be asserted against the United States.

Edd J. Perry, Richard E. King, Manuel T. Donoho, 6 ONA 113 (Jan. 2, 1986)

HEARINGS

In the absence of a dispute as to a material fact, the due process rights of an applicant for a Native allotment are satisfied by an appeal to the Board of Land Appeals.

Edward A. Nickoli, 90 IBLA 272 (Feb. 5, 1986)

HOMESTEAD (ORESTIMBER)

MINERAL RESERVATION

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a methyl hydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert B. Lanier et al., 90 IBLA 293 (Feb. 20, 1986)
93 I.D. 66

INDIANS

GENERALLY

A surface-only private exchange undertaken pursuant to sec. 11 of the Relocation Act, 25 U.S.C. § 640d-10(a)(1) (1982), over the objection of the owner of the mineral interest in the private land involved in the exchange does not violate that Act. The Act imposes no legal requirement on the Secretary of the Interior to acquire such interest.

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 10 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 640d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchange, the opportunity to consent, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 10, 1986)

BLOOD QUANTUM

The Board of Indian Appeals has jurisdiction to review decisions by the Bureau of Indian Affairs concerning applications for certificates of degree of Indian blood.

The procedures followed by the Bureau of Indian Affairs in determining an individual's Indian blood quantum are rules within the meaning of 5 U.S.C. § 551(4) (1982) and are required by 5 U.S.C. § 552 (1982) to be published in the Federal Register.

Under 5 U.S.C. § 552(a)(1) (1982) and the Supreme Court's holding in Morton v. Ruiz, 415 U.S. 199 (1974), an individual may not be adversely affected by a rule required to be published in the Federal Register that is not so published.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986)
93 I.D. 13

CIVIL RIGHTS

Indian Civil Rights Act of 1968

Constitutional prescriptions, such as those contained in the Fifth and Fourteenth Amendments to the United States Constitution, that limit the exercise of Federal and state governmental powers, are not applicable to Indian tribes except to the extent they are explicitly endorsed by a tribal constitution or imposed by Congress.

The Board of Indian Appeals is not the proper forum in which to challenge a tribal ordinance as being violative of the guarantee of equal protection of the laws as provided in the Indian Civil Rights Act.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 66 (Feb. 25, 1986) 93 I.D. 79

LANDS

Alienation of Public Lands

Lands Subject to

Where a Pueblo Indian files an Indian allotment application for land located in New Mexico, pursuant to sec. 9 of the Act of Dec. 22, 1974, 25 U.S.C. § 4404-8 (1982), which provides only for the allotment of certain land in Arizona to qualified Pueblo Indians, the the application is properly rejected.

Claudius A. Welch, 91 IBLA 89 (Mar. 10, 1986)

LAW AND ORDER

Tribal Constitutions, Bylaws, and Ordinances

Petitions for Secretarial action filed under 25 CFR Part 82 are limited to requests for the Secretary to call elections to amend tribal constitutions, to issue charters pursuant to a Federal statute, and for other purposes where constitutions and charters provide for petitioning to effect action by the Secretary.

An election called by the Secretary pursuant to 25 CFR Part 81 is not appropriate for the purposes of temporarily suspending a tribal constitution and recalling and replacing tribal officials.

Pueblo of Isleta Concerned Community Citizens Committee v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 30 (Feb. 12, 1986)

TAXATION

Approval by the Bureau of Indian Affairs of a tax ordinance passed by an Indian tribe in the exercise of its tribal sovereignty does not constitute an agency rule within the meaning of 5 U.S.C. § 551(4) (1982).

A tax ordinance passed by an Indian tribe does not unduly burden interstate commerce if it applies to an activity with a substantial nexus with the tribe, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the tribe.

A taxpayer claiming immunity from an Indian tribal tax has the burden of proving entitlement to an exemption.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 66 (Feb. 25, 1986) 93 I.D. 79

INDIANS—Continued

TRIBAL GOVERNMENT

Elections

Petitions for Secretarial action filed under 25 CFR Part 82 are limited to requests for the Secretary to call elections to amend tribal constitutions, to issue charters pursuant to a Federal statute, and for other purposes where constitutions and charters provide for petitioning to effect action by the Secretary.

An election called by the Secretary pursuant to 25 CFR Part 81 is not appropriate for the purposes of temporarily suspending a tribal constitution and recalling and replacing tribal officials.

Pueblo of Isleta Concerned Community Citizens Committee v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 30 (Feb 12, 1986)

TRIBAL POWERS

Generally

The Board of Indian Appeals has jurisdiction over decisions issued by Bureau of Indian Affairs officials under Chapter I of 25 CFR. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

Vance Gillette, Margaret S. Wilson, & Frank Tyler v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 14 IBIA 71 (Feb. 26, 1986)

Tribal Sovereignty

Approval by the Bureau of Indian Affairs of a tax ordinance passed by an Indian tribe in the exercise of its tribal sovereignty does not constitute an agency rule within the meaning of 5 U.S.C. § 551(4) (1982).

Constitutional prescriptions, such as those contained in the Fifth and Fourteenth Amendments to the United States Constitution, that limit the exercise of Federal and state governmental powers, are not applicable to Indian tribes except to the extent they are explicitly endorsed by a tribal constitution or imposed by Congress.

The Board of Indian Appeals is not the proper forum in which to challenge a tribal ordinance as being violative of the guarantee of equal protection of the laws as provided in the Indian Civil Rights Act.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 66 (Feb. 25, 1986) 93 I.D. 79

LACHES

The Department does not have an affirmative duty to immediately adjudicate a mining claimant's recordation filings made pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

Delay by BLM in declaring mining claims void for failure to file the documents required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), does not negate the

...overnment's right to do so because the statute is ...lf-executing.

...rvation Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

...LLSITES

...NERALLY

An owner of a millsite must be given notice of a ...iling deficiency and an opportunity to make correc... ...ons before the site may be deemed void for failure ...o comply with the requirement of 43 U.S.C. § 1744(a) ...982).

...rvation Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

...ERAL LANDS

...INERAL RESERVATION

Where BLM reports that land within a reclamation ...omestead entry is valuable for oil and gas, after ...atisfactory reclamation final proof has been filed, ...hat report may not be relied upon as a basis for ...position of a mineral reservation unless the Govern... ...ent is prepared to assume the burden, prima facie, ...hat the land is known to be of mineral character at ...he date of acceptance of final proof. Where BLM ...ssues a decision requiring consent to such a reserva... ...ion, but the mineral report states the Government will ...ot assume the burden of proving the reservation is ...roper and the record is unclear whether reservation is ...roper, the decision will be set aside and the case ...emanded for action in accordance with 43 CFR ...3.3-3(c)(7).

...lds Bontemp, 90 IBLA 318 (Feb. 28, 1986)

PROSPECTING PERMITS

If all the requirements for issuance of a pros... ...ecting permit, including those requirements found at ...3 CFR Subpart 3568 are met, it is proper for BLM to ...ssue a prospecting permit for lands within the ...iskeytown-Shasta-Trinity National Recreation Area.

...ycan Exploration, Inc., 91 IBLA 55 (Feb. 28, 1986)

In June 1981 a 2-year extension of a prospecting ...ermit properly ran from the date of expiration of ...he primary term of the permit and a BLM decision ...arporting to extend the term beyond that 2-year ...eriod was improper. Thus, when a prospecting permit ...pplicant filed an application for certain lands ...overed by the extension shortly after the expiration ...f the 2-year period, the land was available and that ...pplicant established priority such that a subsequent ...pplication was properly rejected by BLM.

...tons Resources Corp., 91 IBLA 180 (Mar. 28, 1986)

...INERAL LEASING ACT

GENERALLY

Where a notice of intent to readjust a coal lease ...s given to a lessee prior to expiration of the period

GENERALLY--Continued

allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Manage... ...ment may subsequently provide the specific terms or conditions for readjustment.

The Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amend... ...ments Act lease has no vested rights to the indefinite continuation of existing lease terms. Terms and conditions which are mandated by statute and regulation or are necessary for proper administration of public lands must be included in a readjusted lease.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon read... ...justment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administra... ...tion of the public lands.

Gulf Oil Corp., The Pittsburgh & Midway Coal Mining Co., 91 IBLA 93 (Mar. 13, 1986)

MINING CLAIMS

GENERALLY

Issuance of a patent to a state without mineral reservation removes the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Alaska Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

ABANDONMENT

Failure to file affidavits of assessment work prior to Dec. 31 as required by 43 U.S.C. § 1744(a) (1982), constitutes abandonment of the claims and they may be declared void by BLM.

Delay by BLM in declaring mining claims void for failure to file the documents required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), does not negate the Government's right to do so because the statute is self-executing.

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Manage... ...ment office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

John J. Bay, 91 IBLA 181 (Mar. 28, 1986)

MINING CLAIMS--Continued

COMMON VARIETIES OF MINERALS

Salable Deposit

A deposit of gravel suitable for roadbuilding will be considered a common variety of gravel under sec. 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1982), rather than a locatable mineral, where the record establishes the widespread availability of other deposits of gravel equally suitable for such purpose, notwithstanding the fact that the gravel deposit might be developed more economically because of the size and hardness of the gravel.

Sandstone will be considered a common variety of mineral under sec. 3 of the Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1982), where, although the red coloration of the stone may be unique, there is no evidence that because of the coloration the stone would command a higher price on the market.

<u>United States v. Elmer G. Thomas et al.</u>, 90 IBLA 255 (Jan. 31, 1986)

DETERMINATION OF VALIDITY

A deposit of gravel suitable for roadbuilding will be considered a common variety of gravel under sec. 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1982), rather than a locatable mineral, where the record establishes the widespread availability of other deposits of gravel equally suitable for such purpose, notwithstanding the fact that the gravel deposit might be developed more economically because of the size and hardness of the gravel

Sandstone will be considered a common variety of mineral under sec. 3 of the Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1982), where, although the red coloration of the stone may be unique, there is no evidence that because of the coloration the stone would command a higher price on the market.

A mining claimant will be held not to have overcome the Government's prima facie case of the lack of discovery of a valuable deposit of bentonite where he has not rebutted evidence that the bentonite cannot be mined, removed and marketed at a profit. A mining claimant is not permitted to aggregate the returns obtainable from sale of a nonlocatable common variety of mineral removed as overburden with those which can be obtained from mining the locatable mineral in order to support a discovery.

United States v. Elmer G. Thomas et al., 90 IBLA 255 (Jan. 31, 1986)

DISCOVERY

Marketability

A mining claimant will be held not to have overcome the Government's prima facie case of the lack of discovery of a valuable deposit of bentonite where he has not rebutted evidence that the bentonite cannot be mined, removed and marketed at a profit. A mining claimant is not permitted to aggregate the returns obtainable from sale of a nonlocatable common variety of mineral removed as overburden with those which can be obtained from mining the locatable mineral in order to support a discovery.

United States v. Elmer G. Thomas et al., 90 IBLA 255 (Jan. 31, 1986)

MINING CLAIMS--Continued

LANDS SUBJECT TO

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

<u>Ed Bilderback</u>, 90 IBLA 310 (Feb. 25, 1986)

BLM properly declares a mining claim null and void ab initio where the land has been reconveyed to the United States with a mineral reservation to the grantor or his predecessor in interest, even though the original conveyance from the United States was pursuant to sec. 3 of the Act of July 27, 1866, 14 Stat. 294 (1866), which expressly excluded mineral lands from the operation of the Act.

<u>Gold-West Industries, Inc.</u>, 90 IBLA 372 (Feb. 27, 1986)

LOCATION

Where mining claimants filed lode claims over a placer location previously made by them on the same land for the same mineral, the lode claims cannot legally be treated as an amendment of the placer claim

Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio

Failure by mining claimants to timely record the location notice of a placer claim located prior to 1976 resulted in the invalidation of their placer claim pursuant to provision of sec. 314 of the Federal Land Policy and Management Act of 1976. The filing of assessment affidavits for invalid lode claims located over the placer claim could not operate to avoid the filing requirements of the Act.

<u>Paul Vaillant et al.</u>, 90 IBLA 249 (Jan. 30, 1986)

LODE CLAIMS

Where mining claimants filed lode claims over a placer location previously made by them on the same land for the same mineral, the lode claims cannot legally be treated as an amendment of the placer claim.

Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio.

<u>Paul Vaillant et al.</u>, 90 IBLA 249 (Jan. 30, 1986)

PLACER CLAIMS

Where mining claimants filed lode claims over a placer location previously made by them on the same land for the same mineral, the lode claims cannot legally be treated as an amendment of the placer claim.

Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio

Failure by mining claimants to timely record the location notice of a placer claim located prior to 1976 resulted in the invalidation of their placer claim

PLACER CLAIMS--Continued

pursuant to provision of sec. 314 of the Federal Land Policy and Management Act of 1976. The filing of assessment affidavits for invalid lode claims located over the placer claim could not operate to avoid the filing requirements of the Act.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

RECORDATION

Issuance of a patent to a state without mineral reservation removes the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Alaska Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

The statutes and regulations governing the description of a mining claim given in a location certificate filed for recordation with BLM do not require that the locator submit information sufficiently accurate for BLM to determine the precise position of the claim on a township plat. Rather, the proper test is whether the claim may, in fact, be found and identified on the ground by following the information in the recorded description.

Harley Taylor, 90 IBLA 313 (Feb. 25, 1986)

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), where the owner fails to timely file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 30 of the calendar year following the first filing of such evidence or notice.

Thurman Oil & Mining Co., 90 IBLA 302 (Feb. 26, 1986)

RELOCATION

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

WITHDRAWN LAND

Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

WITHDRAWN LAND--Continued

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

NAVIGABLE WATERS

Federal law must be applied by BLM to determine whether a lake is navigable in fact when determining ownership of a lakebed for purposes of issuance of a Federal oil and gas lease. In such a case, navigability depends upon whether there is evidence to show the lake had been used or was susceptible of being used as a highway for commerce at the time statehood was conferred in 1889. An offer by the state to prove the lake was used as a waterway for commercial logging raises a sufficient issue of fact to require a fact-finding hearing to determine navigability of the lake at statehood.

State of Montana, 91 IBLA 104 (Mar. 14, 1986)

OIL AND GAS LEASES

GENERALLY

The Secretary of the Interior has the discretionary authority to require the execution of special stipulations as a condition precedent to issuance of oil and gas leases for land which is located in a national forest in order to protect environmental and other land use values. In the exercise of that authority BLM may establish a reasonable time limit of 30 days from receipt of notice for an over-the-counter lease offeror to submit a signed lease with the required stipulations. Where the offeror does not object to the stipulations, and files them with BLM in advance of a decision rejecting the offer but after the 30-day period allowed for filing, BLM should consider whether the late filing ought not be accepted under the provisions of 43 CFR 1821.2-2(g).

Bill Mathis et al., 90 IBLA 353 (Feb. 26, 1986)

ACQUIRED LANDS LEASES

Pursuant to 43 CFR 3110.1-3(b), the land in a noncompetitive oil and gas lease offer may not exceed 6 miles square except when the lease offer is for unsurveyed acquired land described by acquisition tract number and less than 50 percent of the tract lies outside the 6-mile square area. More than one tract may be included in the lease offer; however, less than 50 percent of only one tract in the offer may extend outside the 6-mile square area.

Excelsior Exploration Corp., 91 IBLA 76 (Mar. 3, 1986)

OIL AND GAS LEASES--Continued

APPLICATIONS

Competitive

After a simultaneous oil and gas lease drawing the failure of a first-drawn applicant to file an offer in accordance with 43 CFR 3112.6-1 necessitates rejection of the offer. Where the offer form has been signed by one who is designated as an attorney-in-fact for the offeror, either a copy of the document granting the power of attorney must be submitted or a reference must be made to a qualifications file where such authorization has previously been filed, together with a statement the power of attorney is still valid, over the personal handwritten signature, in ink, of the prospective lessee.

Sabine Corp., 90 IBLA 327 (Feb. 26, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

B. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

Attorneys-in-Fact or Agents

After a simultaneous oil and gas lease drawing the failure of a first-drawn applicant to file an offer in accordance with 43 CFR 3112.6-1 necessitates rejection of the offer. Where the offer form has been signed by one who is designated as an attorney-in-fact for the offeror, either a copy of the document granting the power of attorney must be submitted or a reference must be made to a qualifications file where such authorization has previously been filed, together with a statement the power of attorney is still valid, over the personal handwritten signature, in ink, of the prospective lessee.

Sabine Corp., 90 IBLA 327 (Feb. 26, 1986)

Drawings

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

B. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

The Secretary has broad discretion to frame and apply rules in administering the simultaneous oil and gas leasing program. Thus, an application that violates 43 CFR 3112.2-4 by failing to disclose any party or filing service which is in the business of providing assistance to participants in the program is properly rejected for violation of the regulation alone.

Filing Error (On Reconsideration), 91 IBLA 191 (Mar. 31, 1986)

Filing

Where, following a drawing of simultaneously filed oil and gas lease applications, a first-drawn applicant fails to submit the executed lease agreement and advance rental within 30 days of receipt of notice to do so, the application is properly rejected

Janet P. Larson, 91 IBLA 151 (Mar. 25, 1986)

Six-Mile-Square Rule

Pursuant to 43 CFR 3110.1-3(b), the land in a noncompetitive oil and gas lease offer may not exceed 6 miles square except when the lease offer is for unsurveyed acquired land described by acquisition tract number and less than 50 percent of the tract lies outside the 6-mile square area. More than one tract may be included in the lease offer; however, less than 50 percent of only one tract in the offer may extend outside the 6-mile square area.

Excelsior Exploration Corp., 91 IBLA 76 (Mar. 3, 1986)

ASSIGNMENTS OR TRANSFERS

Where the record titleholder of an oil and gas lease has made numerous assignments of interests in that lease, none of which has been approved by BLM, and the lease terminates by operation of law for failure to pay rental timely, only the record titleholder, and not any of the holders of unapproved assignments, may successfully petition for reinstatement of the lease pursuant to 30 U.S.C. § 188(c) or (d) (1982). The right to petition for reinstatement is personal to the record titleholder of the lease.

Howard H. Vinson et al., 90 IBLA 280 (Feb. 10, 1986)

An oil and gas lease on which there is no well capable of production in paying quantities terminates automatically by operation of law where the annual rental is not paid on or before the lease anniversary date. Although an assignment of 100 percent of record title to a portion of the leased lands segregates the assigned portion and the retained portion into separate leases, this is not true of an assignment of operating rights and timely payment of the rental for the entire lease acreage is required to maintain the lease.

An assignment of operating rights in an oil and gas lease may not be approved after the lease has terminated for nonpayment of the annual rental and a decision dismissing a petition for reinstatement of the lease by the assignee of an unapproved assignment of operating rights will be affirmed.

Albert D. Fleck, Carl J. Williams, William L. Medalie, 91 IBLA 187 (Mar. 31, 1986)

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES

The Bureau of Land Management may properly issue a notice of an incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations for each calendar month, beginning with the month in which drilling operations were initiated.

An assessment for failure to file production reports in a timely manner pursuant to 43 CFR 3163.3(b) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied.

Sonat Oil Co., Inc., 91 IBLA 137 (Mar. 28, 1986)

Where BLM issues notices of incidents of noncompliance to an oil and gas operator for failure to seal "appropriate valves" under 43 CFR 3162.7-4(a) and assesses the operator $250 per violation in accordance with 43 CFR 3163.3(j), and on appeal the operator establishes that, as applied to the operator's situation, the "appropriate valve" requirement is ambiguous, the violations and assessments will be overturned.

Anadarko Production Co., 91 IBLA 154 (Mar. 25, 1986)

COMMUNITIZATION AGREEMENTS

Where a producing unit agreement terminates after the conclusion of the primary term of the parent lease and part of the lands in the parent lease are simultaneously committed to a second producing unit, thereby effecting a segregation of the parent lease, the term of the noncommitized lease without production shall be for so long as oil or gas is produced in paying quantities upon the unitized lease, but not less than 2 years, and so long thereafter as oil or gas is produced in paying quantities on the noncommitized lease.

Conoco, Inc., 90 IBLA 388 (Feb. 28, 1986)

Nexpro Co., 90 IBLA 394 (Feb. 28, 1986)

COMPETITIVE LEASES

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale. A BLM decision rejecting a high bid as inadequate will be affirmed if appellant fails to overcome the Government's prima facie showing of correctness of its estimated minimum acceptable fair market value for the parcel and establish that appellant's bid reasonably reflects fair market value.

Suzanne Walsh, 91 IBLA 119 (Mar. 17, 1986)

DISCRETION TO LEASE

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale. A BLM decision rejecting a high bid as inadequate will be affirmed if appellant fails to overcome the Government's prima facie showing of correctness of its estimated minimum acceptable fair market value for the parcel and establish that appellant's bid reasonably reflects fair market value.

Suzanne Walsh, 91 IBLA 119 (Mar. 17, 1986)

OIL AND GAS LEASES--Continued

DRAINAGE

Where Geological Survey decides to deviate from straight net-acre feet allocation of production from a common reservoir, a 6-month period prior to formation of a unit agreement during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986); 93 I.D. 95

EXTENSIONS

Where a producing unit agreement terminates after the conclusion of the primary term of the parent lease and part of the lands in the parent lease are simultaneously committed to a second producing unit, thereby effecting a segregation of the parent lease, the term of the noncommitized lease without production shall be for so long as oil or gas is produced in paying quantities upon the unitized lease, but not less than 2 years, and so long thereafter as oil or gas is produced in paying quantities on the noncommitized lease.

Conoco, Inc., 90 IBLA 388 (Feb. 28, 1986)

Nexpro Co., 90 IBLA 394 (Feb. 28, 1986)

INCIDENTS OF NONCOMPLIANCE

The Bureau of Land Management may properly issue a notice of an incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations for each calendar month, beginning with the month in which drilling operations were initiated.

Sonat Oil Co., Inc., 91 IBLA 137 (Mar. 28, 1986)

KNOWN GEOLOGIC STRUCTURE

Pursuant to sec. 17(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected.

Charles D. Arper, 90 IBLA 375 (Feb. 27, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

R. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

BLM must reject a noncompetitive oil and gas lease offer to the extent it includes land determined after the filing of simultaneous oil and gas lease applications to be within a known geologic structure which, under 30 U.S.C. § 226(b) (1982), is subject to leasing only by competitive bidding.

John Budde, 91 IBLA 162 (Mar. 25, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

LANDS SUBJECT TO

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert D. Lanier et al., 90 IBLA 293 (Feb. 20, 1986)
93 I.D. 66

NONCOMPETITIVE LEASES

Pursuant to sec. 17(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected.

Charles D. Arner, 90 IBLA 375 (Feb. 27, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

R. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

The Bureau of Land Management is not authorized to reject conditions imposed by the United States Forest Service upon acquired land managed by the Forest Service pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (1982). Where an oil and gas lessee objects to provisions of an apparent attempt by the Forest Service to condition the terms of his oil and gas lease on acquired land, agencies of the

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

Department of the Interior may not adjudicate the validity of the challenged conditions.

James E. Chadsey, 91 IBLA 167 (Mar. 24, 1986)

BLM must reject a noncompetitive oil and gas lease offer to the extent it includes land determined after the filing of simultaneous oil and gas lease applications to be within a known geologic structure which, under 30 U.S.C. § 226(b) (1982), is subject to leasing only by competitive bidding.

John Budde, 91 IBLA 162 (Mar. 25, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

REINSTATEMENT

Under 30 U.S.C. § 188(c) (1982), BLM lacks authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

Lucas Robert, 90 IBLA 182 (Jan. 23, 1986)

Where the record titleholder of an oil and gas lease has made numerous assignments of interests in that lease, none of which has been approved by BLM, and the lease terminates by operation of law for failure to pay rental timely, only the record titleholder, and not any of the holders of unapproved assignments, may successfully petition for reinstatement of the lease pursuant to 30 U.S.C. § 188(c) or (d) (1982). The right to petition for reinstatement is personal to the record titleholder of the lease.

Howard M. Vinson et al., 90 IBLA 280 (Feb. 10, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

BLM may properly condition class II reinstatement, under 30 U.S.C. §§ 188(d) and (e) (1982), of a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental upon tender of the required back rental, computed at the increased rate of $5 per acre set forth in 30 U.S.C. § 188(e)(2) (1982), within 60 days after receipt of a notice of termination.

Monica T. Boyland, 90 IBLA 349 (Feb. 26, 1986)

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

the full amount of rental due within 20 days of the anniversary date of the lease.

Wayne J. Stanley, 90 IBLA 357 (Feb. 27, 1986)

An assignment of operating rights in an oil and gas lease may not be approved after the lease has terminated for nonpayment of the annual rental and a decision dismissing a petition for reinstatement of the lease by the assignee of an unapproved assignment of operating rights will be affirmed.

Albert R. Fleck, Carl J. Williams, William L. Medalie, 91 IBLA 187 (Mar. 31, 1986)

RENTALS

Where, following a drawing of simultaneously filed oil and gas lease applications, a first-drawn applicant fails to submit the executed lease agreement and advance rental within 30 days of receipt of notice to do so, the application is properly rejected.

Carol B. Larson, 91 IBLA 151 (Mar. 25, 1986)

ROYALTIES

The regulation at 30 CFR 243.2 provides that decisions regarding payment of additional royalties are suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor against loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a substantial legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

Phillips Oil Co., 90 IBLA 236 (Jan. 30, 1986)
93 I.D. 6

REGULATIONS

The Secretary of the Interior has the discretionary authority to require the execution of special stipulations as a condition precedent to issuance of oil and gas leases for land which is located in a national forest in order to protect environmental and other land use values. In the exercise of that authority BLM may establish a reasonable time limit of 30 days from receipt of notice for an over-the-counter simultaneous offeror to submit a signed lease with the required stipulations. Where the offeror does not agree to the stipulations, and files them with BLM in advance of a decision rejecting the offer but after the 30-day period allowed for filing, BLM should consider whether the late filing ought not be accepted under the provisions of 43 CFR 1821.2-2(g).

Mathis et al., 90 IBLA 353 (Feb. 26, 1986)

OIL AND GAS LEASES--Continued

STIPULATIONS--Continued

The Bureau of Land Management is not authorized to reject conditions imposed by the United States Forest Service upon acquired land managed by the Forest Service pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (1982). Where an oil and gas lessee objects to provisions of an apparent attempt by the Forest Service to condition the terms of his oil and gas lease on acquired land, agencies of the Department of the Interior may not adjudicate the validity of the challenged conditions.

James B. Chadney, 91 IBLA 143 (Mar. 24, 1986)

TERMINATION

Under 30 U.S.C. § 188(c) (1982), BLM lacks authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

Lucas Roberts, 90 IBLA 182 (Jan. 23, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

BLM may properly condition class II reinstatement, under 30 U.S.C. §§ 188(d) and (e) (1982), of a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental upon tender of the required back rental, computed at the increased rate of $5 per acre set forth in 30 U.S.C. § 188(e)(2) (1982), within 60 days after receipt of a notice of termination.

Monica V. Rowland, 90 IBLA 389 (Feb. 26, 1986)

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease

Wayne J. Stanley, 90 IBLA 357 (Feb. 27, 1986)

An oil and gas lease on which there is no well capable of production in paying quantities terminates automatically by operation of law where the annual rental is not paid on or before the lease anniversary date. Although an assignment of 100 percent of record title to a portion of the leased lands segregates the assigned portion and the retained portion into separate leases, this is not true of an assignment of operating rights and timely payment of the rental for the entire lease acreage is required to maintain the lease.

Albert R. Fleck, Carl J. Williams, William L. Medalie, 91 IBLA 187 (Mar. 31, 1986)

UNIT AND COOPERATIVE AGREEMENTS

Where a producing unit agreement terminates after the conclusion of the primary term of the parent lease and part of the lands in the parent lease are simultaneously committed to a second producing unit, thereby effecting a segregation of the parent lease, the term of the nonunitized lease without production shall be for so long as oil or gas is produced in paying quantities upon the unitized lease, but not less than

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS--Continued

2 years, and so long thereafter as oil or gas is produced in paying quantities on the nonsegregated lease.

Conoco, Inc., 90 IBLA 388 (Feb. 28, 1986)

Texaco Co., 90 IBLA 394 (Feb. 28, 1986)

Where an appellant criticizes a division of a reservoir delineated by Geological Survey on the Outer Continental Shelf on the grounds that various errors resulted in inaccurate allocation of original gas-in-place, and the evidence fails to establish that any substantial error occurred, the reservoir division will be affirmed.

The law of capture, which provides that the owner of a tract acquires title to the oil and gas which he produces from wells drilled thereon, even though part of such oil or gas migrated from adjoining lands, is fully applicable on the Outer Continental Shelf in the absence of a unitization agreement. Where, however, unitization has been ordered, allocation of production to competing tracts should normally be made on the basis of net-acre feet.

Where Geological Survey decides to deviate from straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of a unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a) (2) (A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

OUTER CONTINENTAL SHELF LANDS ACT

GENERALLY

The Department may begin presale procedures for a lease sale before the approval of the 5-year schedule on which it is listed.

Whether the Department May Issue a Call for Information & Nominations for Outer Continental Shelf Lease Sale
91, M-36958 (Feb. 10, 1986) 93 I.D. 125

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES

Where an appellant criticizes a division of a reservoir delineated by Geological Survey on the Outer Continental Shelf on the grounds that various errors resulted in inaccurate allocation of original gas-in-place, and the evidence fails to establish that any substantial error occurred, the reservoir division will be affirmed.

The law of capture, which provides that the owner of a tract acquires title to the oil and gas which he produces from wells drilled thereon, even though part of such oil or gas migrated from adjoining lands, is fully applicable on the Outer Continental Shelf in the absence of a unitization agreement. Where, however, unitization has been ordered, allocation of production to competing tracts should normally be made on the basis of net-acre feet.

Where Geological Survey decides to deviate from straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of a unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a) (2) (A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

STATE LAWS

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a) (2) (A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

UNIT PLANS

Where an appellant criticizes a division of a reservoir delineated by Geological Survey on the Outer Continental Shelf on the grounds that various errors resulted in inaccurate allocation of original gas-in-place, and the evidence fails to establish that any substantial error occurred, the reservoir division will be affirmed.

The law of capture, which provides that the owner of a tract acquires title to the oil and gas which he produces from wells drilled thereon, even though part of such oil or gas migrated from adjoining lands, is fully applicable on the Outer Continental Shelf in the absence of a unitization agreement. Where, however, unitization has been ordered, allocation of production to competing tracts should normally be made on the basis of net-acre feet.

Where Geological Survey decides to deviate from straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

PATENTS OF PUBLIC LANDS

CORRECTIONS

Where one holding a patent from the United States seeks to have the patent corrected to eliminate a reservation in accordance with sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), alleging that the purpose for the reservation no longer exists, the application is properly rejected where the record shows the reservation was not erroneously included in the patent on the basis of a mistake of fact.

Mr. & Mrs. Hinton, Marylee Hinton, 91 IBLA 108 (Mar. 14, 1986)

RESERVATIONS

The reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a well as a component of the naturally formed gases incidental to the underlying reservoir. Hence, an application for recordable disclaimer of interest in

RESERVATIONS--Continued

the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert D. Lasher et al., 90 IBLA 291 (Feb. 20, 1986)
93 I.D. 44

BLM properly declares a mining claim null and void ab initio where the land has been reconveyed to the United States with a mineral reservation to the grantor or his predecessor in interest, even though the original conveyance from the United States was pursuant to sec. 3 of the Act of July 27, 1866, 14 Stat. 292 (1866), which expressly excluded mineral lands from the operation of the Act.

Gold-West Industries, Inc., 90 IBLA 372 (Feb. 27, 1986)

SUITS TO CANCEL

The Department is barred from initiating action to vacate and annul a patent of public lands 6 years after the date of issuance of the patent, unless the patent was procured by fraud.

Alaska Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

PAYMENTS

GENERALLY

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

PRIVATE EXCHANGES

GENERALLY

A surface-only private exchange undertaken pursuant to sec. 11 of the Relocation Act, 25 U.S.C. § 640d-10(a)(1) (1982), over the objection of the owner of the mineral interest in the private land involved in the exchange does not violate that Act. The Act imposes no legal requirement on the Secretary of the Interior to acquire such interest.

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 10 miles of the

PRIVATE EXCHANGES--Continued

OPPOSITION--Continued

boundary of the Havasu Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 6404-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchanges, the opportunity to consent, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

PROTESTS

Under certain circumstances a document styled as a protest is properly treated as an appeal. Thus, where prior to completion of a private exchange by BLM, the owner of the mineral interest in the private land involved therein requests that BLM acquire its interest and BLM proceeds to complete the exchange and subsequently deny the request, a protest filed by the owner should be treated by BLM as an appeal of its denial and the case file forwarded to the Board of Land Appeals.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

PUBLIC INTEREST

A BLM decision to proceed with a proposed land exchange of public land containing wetlands and situated within a floodplain pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), as consistent with the public interest, will be vacated and remanded where the record shows that BLM did not consider including in the deed of conveyance a requirement to preserve the beneficial values of the floodplain consistent with Executive Order No. 11988 and BLM floodplain guidelines.

Sandiburre Ranches, Inc., et al., 90 IBLA 360 (Feb. 27, 1986)

RAILROAD GRANT LANDS

BLM properly declares a mining claim null and void ab initio where the land has been reconveyed to the United States with a mineral reservation to the grantor or his predecessor in interest, even though the original conveyance from the United States was pursuant to sec. 3 of the Act of July 27, 1866, 14 Stat. 294 (1866), which expressly excluded mineral lands from the operation of the Act.

Gold-West Industries, Inc., 90 IBLA 372 (Feb. 27, 1986)

RECLAMATION HOMESTEADS

Where BLM reports that land within a reclamation homestead entry is valuable for oil and gas, after satisfactory reclamation final proof has been filed, that report may not be relied upon as a basis for imposition of a mineral reservation unless the Government is prepared to assume the burden, prima facie, that the land is known to be of mineral character at the date of acceptance of final proof. Where BLM issues a decision requiring consent to such a reservation, but the mineral report states the Government will

RECLAMATION HOMESTEADS--Continued

not assume the burden of proving the reservation is proper and the record is unclear whether reservation is proper, the decision will be set aside and the case remanded for action in accordance with 43 CFR 2093.3-3(c)(2).

Wilda Bowlegs, 90 IBLA 319 (Feb. 24, 1986)

REGULATIONS

GENERALLY

Approval by the Bureau of Indian Affairs of a tax ordinance passed by an Indian tribe in the exercise of its tribal sovereignty does not constitute an agency rule within the meaning of 5 U.S.C. § 551(4) (1982).

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 44 (Feb. 24, 1986) 93 I.D. 19

An assessment for failure to file production reports in a timely manner pursuant to 43 CFR 3163.3(b) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied.

Sargent Oil Co., Inc., 91 IBLA 137 (Mar. 24, 1986)

APPLICABILITY

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 6404-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchanges, the opportunity to consent, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

FORCE AND EFFECT AS LAW

A Bureau of Land Management instruction memorandum is merely a document for internal use by BLM employees. Such documents are not regulations and have no legal force or effect.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

PUBLICATION

The procedures followed by the Bureau of Indian Affairs in determining an individual's Indian blood quantum are rules within the meaning of 5 U.S.C. § 551(4) (1982) and are required by 5 U.S.C. § 552 (1982) to be published in the Federal Register.

Under 5 U.S.C. § 552(a)(1) (1982) and the Supreme Court's holding in Morton v. Ruiz, 415 U.S. 199 (1974), an individual may not be adversely affected by a rule required to be published in the Federal Register that is not so published.

Morgan Underwood, Sr. v. Deputy Asst Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

RIGHTS-OF-WAY

GENERALLY

Whenever the Secretary of the Interior makes any conveyance of land under any of the public land laws, he may reserve a right-of-way for trails within the National Trails System to the extent he deems necessary to carry out the purposes of the National Trails System Act, 16 U.S.C. § 1241 (1982).

The Bureau of Land Management may issue a certificate of allotment subject to a continued right of public access along a segment of the Iditarod National Historic Trail crossing through allotment lands. Such conveyance is an exercise of the discretion vested in the Secretary pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 - 270-3 (1970).

In the absence of legislative approval of a Native allotment, title to the land is an approved allotment application rests with the United States and does not pass to the Native until the land described therein has been surveyed and a "Native Allotment" issued. Therefore, 25 CFR 169.3, which requires that the Secretary obtain written consent from Indians prior to granting a right-of-way across Indian land, does not apply to approved Native allotment applications prior to survey and issuance of the "Native Allotment."

Alfred A. Nickoli, 90 IBLA 273 (Feb. 5, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of non-linear rights-of-way is the comparable lease appraisal.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

APPLICATIONS

A BLM decision advising an applicant for a wind energy project of a perceived defect in his application and allowing 30 days to cure the deficiency is interlocutory in nature.

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management to prohibit wind energy development within the Table Mountain Area of Critical Environmental Concern will be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest. An application for a right-of-way for a wind energy project will be rejected where lands described therein are not available for development.

Kenneth W. Bosley, Westwind Electric, Inc., 91 IBLA 172 (Mar. 28, 1986)

APPRAISALS

BLM properly requires the municipal holder of a right-of-way for a water treatment plant to pay fair rental value in accordance with sec. 504(g) of Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

"Municipal utility." A municipal utility is a political subdivision or agency of a political subdivision which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service.

City of Redding, 91 IBLA 82 (Mar. 11, 1986)

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), authorizes the Secretary of the Interior to charge less than fair market value for right-of-way rental. However, a for profit business whose principal source of revenue results from subleasing communication facilities is not entitled to a reduction or waiver of a rental fee based on fair market value merely by providing a service to Government agencies or representatives of Government agencies.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management to prohibit wind energy development within the Table Mountain Area of Critical Environmental Concern will be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest. An application for a right-of-way for a wind energy project will be rejected where lands described therein are not available for development.

Kenneth W. Bosley, Westwind Electric, Inc., 91 IBLA 172 (Mar. 28, 1986)

RULES OF PRACTICE

GENERALLY

While it is true that after a notice of appeal of a BLM decision has been filed with the Board, BLM lacks authority to modify the decision under appeal, BLM is not precluded from undertaking analyses as to the correctness of its original decision. Where the record on appeal includes a re-evaluation by the Bureau completed subsequent to the filing of an appeal concluding that areas previously designated as within a known geologic structure are not so located, such a determination cannot be ignored.

R. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

APPEALS

Generally

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and, thus, is a protest.

Randall J. Gerlach, 90 IBLA 338 (Feb. 26, 1986)

Burden of Proof

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive to accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.205-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 8 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 8-foot lifts did not create a condition which was hazardous per se since it was contemplated that the

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice is laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside duals and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting soil-cement outside the 8-foot width shown on the plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or the semi-pervious portion of the inclined bank) as slippery or slick.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

Under a dam rehabilitation contract containing unit prices for construction items, where the Government claims it is entitled to a downward equitable adjustment on change order work but fails to offer any persuasive evidence in support of the revised unit prices contended for, the Board finds that the Government has failed to sustain its burden of proof.

A. D. Fossi Corp., IBCA-1923 (Feb. 27, 1986) 93 I.D. 92

Dismissal

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of the notice of appeal is jurisdictional, and failure to file an appeal within the time allowed requires its dismissal.

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal.

Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173 (Jan. 21, 1986)

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with a district office of BLM, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Eklutna, Inc., 90 IBLA 196 (Jan. 30, 1986)

RULES OF PRACTICE--Continued

APPEALS--Continued

Effect of

Under certain circumstances a document styled as a rotest is properly treated as an appeal. Thus, where ior to completion of a private exchange by BLM, the ner of the mineral interest in the private land volved therein requests that BLM acquire its inter- t and BLM proceeds to complete the exchange and bsequently deny the request, a protest filed by the ner should be treated by BLM as an appeal of its ial and the case file forwarded to the Board of Land peals.

Due process does not require notice and a prior ght to be heard in all cases in which there is an leged impairment of property rights so long as the rson is given notice and an opportunity to be heard fore the alleged impairment becomes final. Appeal to Board of Land Appeals satisfies the due process uirements

ta Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 6)

The regulation at 30 CFR 243.2 provides that isions regarding payment of additional royalties are suspended by the filing of an appeal therefrom, but horizes the Director, Minerals Management Service, stay the decision upon a finding that a suspension l not be detrimental to the lessor and upon submis- of a bond deemed adequate to indemnify the lessor loss or damage. A decision denying a stay pending olution of a timely filed appeal may be reversed in absence of a reasoned finding that the stay would etrimental to the lessor where the appeal raises a fide legal issue, lessee is faced with the threat rreparable injury if the stay is not granted, it ars the threatened injury to the lessee outweighs potential harm the stay may cause the lessor, and oes not appear from the record that a stay is rary to the public interest.

thon Oil Co., 90 IBLA 236 (Jan. 30, 1986)
93 I.D. 6

While it is true that after a notice of appeal of decision has been filed with the Board, BLM lacks rity to modify the decision under appeal, BLM is precluded from undertaking analyses as to the ctness of its original decision. Where the record peal includes a re-evaluation by the Bureau con- d subsequent to the filing of an appeal concluding areas previously designated as within a known gic structure are not so located, such a determi- n cannot be ignored.

Killion, 90 IBLA 378 (Feb. 27, 1986)

tice of Appeal

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, Inc., 90 IBLA 196 (Jan. 30, 1986)

RULES OF PRACTICE--Continued

APPEALS--Continued

Notice of Appeal--Continued

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and, thus, is a protest.

Randall J. Gerlach, 90 IBLA 338 (Feb. 26, 1986)

Standing to Appeal

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision dismissing his protest under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest on procedural grounds.

Eugene M. Witt, 90 IBLA 265 (Jan. 31, 1986)

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision approving a Native allotment application under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest for procedural reasons.

Eugene M. Witt, 90 IBLA 330 (Feb. 26, 1986)

The intent of the regulations limiting standing to appeal to a party to the case is to afford a rational framework for administrative decisionmaking on the assumption that the initial decisionmaker will have had the benefit of the input of such a party in reaching its decision. Where a party has actively participated in the consideration of an inventory unit for eligibility as a wilderness study area has requested in writing the opportunity to comment on applications for permit to drill (APD's) filed for lands within the unit, and has been recognized by the Bureau of Land Management as a party wishing to have input in the process of adjudicating APD's filed for lands within the unit, it is entitled to notice of the filing of those APD's, and it will be recognized as a party to the case on appeal of decisions granting APD's within the unit.

Utah Wilderness Ass'n, 91 IBLA 124 (Mar. 19, 1986)

A BLM decision advising an applicant for a wind energy project of a perceived defect in his application and allowing 30 days to cure the deficiency is interlocutory in nature.

Kenneth W. Bosley, Westwind Electric, Inc., 91 IBLA 172 (Mar. 28, 1986)

Timely Filing

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of the notice of appeal is jurisdictional, and failure to file an appeal within the time allowed requires its dismissal.

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish

that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.411(c) more than 30 days prior to the filing of the notice of appeal

Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173 (Jan. 31, 1986)

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with a district office of BLM, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Salerno, Inc., 90 IBLA 196 (Jan. 30, 1986)

EVIDENCE

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive to accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

Riverside General Construction Co., Inc., IBCA-1603-1-82 (Feb. 13, 1986) 93 I.D. 27

HEARINGS

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

PROTESTS

Under certain circumstances a document styled as a protest is properly treated as an appeal. Thus, where prior to completion of a private exchange by BLM, the owner of the mineral interest in the private land involved therein requests that BLM acquire its interest and BLM proceeds to complete the exchange and subsequently deny the request, a protest filed by the owner should be treated by BLM as an appeal of its denial and the case file forwarded to the Board of Land Appeals.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing to which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and, thus, is a protest.

Randall J. Gerlach, 90 IBLA 338 (Feb. 26, 1986)

SEGREGATION

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Silberbach, 90 IBLA 319 (Feb. 25, 1986)

STATE SELECTIONS

Issuance of a patent to a state without mineral reservation removes the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Alaska Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

STATUTES

The purposes of applying FLPMA's filing provisions to claims located before the Act was passed--to rid Federal lands of stale mining claims and to provide for centralized collection by Federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims--are clearly legitimate and, therefore, application of these provisions to claims located prior to FLPMA is permissible.

Thurman Oil & Mining Co., 90 IBLA 382 (Feb. 26, 1986)

STATUTORY CONSTRUCTION

GENERALLY

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 6400-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 6400-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

ADMINISTRATIVE PROCEDURE

Appeals

An appeal of a decision by an Administrative Law Judge which approves a settlement agreement between the party that filed an application for review of issuance of a mine permit pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), and OSM, which issued the permit, in the absence of consent by the permittee, will be affirmed where the agreement, which includes withdrawal of the application for review, does not adversely affect any of the permittee's interests and the permittee is, therefore, no longer an interested party in the proceedings.

An application for review of issuance of a mine permit filed pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), will be considered timely filed where the evidence establishes that the receipt for certified mail was postmarked within 30 days of notification to the permittee of the final decision of OSM to issue the permit.

Peabody Coal Co. (Appellant) v. The Hopi Tribe & Office of Surface Mining Reclamation & Enforcement (Appellees), 91 IBLA 59 (Feb. 28, 1986)

CIVIL PENALTIES

Amount

Mitigating factors such as the diligence and good faith effort of the permittee to effect compliance are properly considered in determining the amount of a civil penalty assessed for a violation under sec. 518(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and 30 CFR 723.15(a). However, where failure of the permittee to abate the violation within the time allowed results in a failure-to-abate cessation order, sec. 518(h) of SMCRA and 30 CFR 723.15(b) provide no authority for mitigation of the statutory minimum penalty of $750 per day on the basis of the permittee's ability to comply.

Peabody Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 90 IBLA 186 (Jan. 28, 1986) 93 I.D. 1

Diligence

Mitigating factors such as the diligence and good faith effort of the permittee to effect compliance are properly considered in determining the amount of a civil penalty assessed for a violation under sec. 518(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and 30 CFR 723.15(a). However, where failure of the permittee to abate the violation within the time allowed results in a failure-to-abate cessation order, sec. 518(h) of SMCRA and 30 CFR 723.15(b) provide no authority for mitigation of the statutory minimum penalty of $750 per day on the basis of the permittee's ability to comply.

Peabody Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 90 IBLA 186 (Jan. 28, 1986) 93 I.D. 1

HEARINGS

Hearings

An appeal of a decision by an Administrative Law Judge which approves a settlement agreement between the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

PERMITS--Continued

Hearings--Continued

party that filed an application for review of issuance of a mine permit pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), and OSM, which issued the permit, in the absence of consent by the permittee, will be affirmed where the agreement, which includes withdrawal of the application for review, does not adversely affect any of the permittee's interests and the permittee is, therefore, no longer an interested party in the proceedings.

An application for review of issuance of a mine permit filed pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), will be considered timely filed where the evidence establishes that the receipt for certified mail was postmarked within 30 days of notification to the permittee of the final decision of OSM to issue the permit.

Peabody Coal Co. (Appellant) v. The Hopi Tribe & Office of Surface Mining Reclamation & Enforcement (Appellees), 91 IBLA 59 (Feb. 28, 1986)

SURVEYS OF PUBLIC LANDS

GENERALLY

The Secretary of the Interior is authorized to consider and determine the extent of the public lands. This authority includes the authority to survey parcels conveyed from Federal ownership which border public lands. Where a Government survey of a private claim is challenged, the protestant must establish by clear and convincing evidence the survey is not an accurate portrayal of the lands conveyed.

John D. Carter, Sr., Verna P. Carter, 90 IBLA 286 (Feb. 13, 1986)

BLM may properly reject a color-of-title application filed pursuant to sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the document relied upon as initiating color of title does not on its face purport to convey the claimed land, regardless of whether a contemporaneous county survey included the land in the conveyance and claimant has subsequently occupied the land.

Dale F. Pettig, 90 IBLA 323 (Feb. 25, 1986)

WITHDRAWALS AND RESERVATIONS

STATE SELECTIONS

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

WORDS AND PHRASES

"Improvements." As used in sec. 905(a)(5)(C) of ANILCA, the term "improvements" does not carry any special meaning, but rather has its legal meaning in relation to real property. Thus, an improvement must enhance the present value of the land.

Eugene M. Witt, 90 IBLA 330 (Feb. 26, 1986)

"Municipal utility." A municipal utility is a political subdivision or agency of a political subdivision which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service.

City of Redding, 91 IBLA 82 (Mar. 11, 1986)

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WASHINGTON, D.C. 20240

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Office of Hearings and Appeals--Paul T. Baird, Director

Office of the Solicitor-------- Ralph W. Tarr, Solicitor

INDEX-DIGEST

JANUARY-JUNE 1986

This index-digest covers all the published and all the important unpublished decisions and opinions of the Department of the Interior for the period from January 1, through June 30, 1986, rendered in the Office of Hearings and Appeals, Ballston Towers, Building No 3, 4015 Wilson Boulevard, Arlington, Va 22203 and in the Office of the Solicitor, Interior Building, 18th and C Streets, N.W., Washington, D.C. 20240.

Decisions and opinions cited as appearing in 93 I.D. are published and copies may be obtained by subscription from the Superintendent of Documents, U.S Government Printing Office, Washington, D.C. 20402. Other decisions and opinions are unpublished and copies may be obtained from the Office of Hearings and Appeals or the Office of the Solicitor as provided in 43 CFR Part 2.

Editor: Rachael Cubbage

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SYMBOLS

ANCAB - Alaska Native Claims Appeals Board
IA-T - Indian Appeals--Tort
IBCA - Interior Board of Contract Appeals
IBIA - Interior Board of Indian Appeals
IBLA - Interior Board of Land Appeals
IBSMA - Interior Board of Surface Mining Appeals
M - Solicitor's Opinion
OHA - Office of Hearings and Appeals
SEC - Office of the Secretary

ACCOUNTS

PAYMENTS

Under sec. 8 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co., et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

REFUNDS

BLM must reject a noncompetitive oil and gas lease offer for acquired lands pursuant to 43 CFR 3112.5-2(b) where the land sought to be leased is determined to be within a known geologic structure after a simultaneous oil and gas lease drawing but prior to lease issuance. In such circumstances, the offeror is not entitled to a refund of the filing fee submitted with her lease application or interest on the first year's advance rental submitted with her lease offer.

Evelyn D. Bumkstehl, 91 IBLA 388 (Apr. 28, 1986)

Failure of the high bidder at a competitive oil and gas lease sale to execute a lease, tender the balance of the bonus bid, and pay the first year's lease rental within 30 days of notice to do so, results in forfeiture of the deposit submitted with the high bid. Refund of the deposit because offeror elects after the sale to withdraw his offer is not allowed.

D. B. Allsup, B. B. Allsup, 92 IBLA 197 (June 12, 1986)

ACQUIRED LANDS

Lands which were acquired under the Weeks Act for a national forest are not subject to location of mining claims under 30 U.S.C. § 22 (1982). Such "acquired lands" are properly distinguished from "public domain" or "public lands" withdrawn or reserved for national forest purposes which are subject to mineral entry under 16 U.S.C. §§ 475, 478 (1982).

Melvin Frazee, M. Diane Colby, 92 IBLA 20 (May 6, 1986)

ACT OF JULY 17, 1914

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in

ACT OF JULY 17, 1914--Continued

the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert D. Lanier et al., 90 IBLA 293 (Feb. 20, 1986)
93 I.D. 66

ACT OF AUGUST 1, 1956

BLM properly rejects BLO 1613 applications to purchase lands adjoining lands that were not in private ownership or in a pending application on Apr. 7, 1958.

United Methodist Church et al., 92 IBLA 318 (June 26, 1986)

ADMINISTRATIVE AUTHORITY

GENERALLY

The Board of Land Appeals does not have authority to declare acts of Congress unconstitutional. If an enactment of Congress is in conflict with the United States Constitution, it is for the judicial branch to so declare.

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

A Bureau of Land Management instruction memorandum is merely a document for internal use by BLM employees. Such documents are not regulations and have no legal force or effect.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

Where lands described in a previously relinquished Native Allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native Allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

ESTOPPEL

The fact that a mining claimant has held a claim for many years in good faith and performed work on the claim is not determinative of the existence of a discovery.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 245 (Apr. 8, 1986)

ADMINISTRATIVE PRACTICE

While it is true that after a notice of appeal of a BLM decision has been filed with the Board, BLM lacks authority to modify the decision under appeal, BLM is not precluded from undertaking analyses as to the correctness of its original decision. Where the record on appeal includes a re-evaluation by the Bureau completed subsequent to the filing of an appeal concluding

that areas previously designated as within a known geologic structure are not so located, such a determination cannot be ignored

R. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

ADMINISTRATIVE PROCEDURE

GENERALLY

The regulation at 30 CFR 243.2 provides that decisions regarding payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

Marathon Oil Co., 90 IBLA 236 (Jan. 30, 1986)
93 I.D. 6

A document sent certified mail by BLM to a person at his last address of record is considered to have been constructively served on that person at the time of return by the Postal Service of the undelivered certified letter, and such constructive service is equivalent in legal effect to actual service of the document. An oil and gas lessee's last address of record is that stated on the lease application form, unless the lessee has filed written notice of a change of address with the issuing BLM office. Thus, the time for filing a petition for reinstatement of a terminated oil and gas lease begins on the date the notice of termination was returned to BLM as undeliverable after it was sent to the lessee's last address of record, and expires 60 days later.

James Darby, 92 IBLA 231 (June 25, 1986)

ADJUDICATION

An appeal of a decision by an Administrative Law Judge which approves a settlement agreement between the party that filed an application for review of issuance of a mine permit pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), and OSM, which issued the permit, in the absence of consent by the permittee, will be affirmed where the agreement, which includes withdrawal of the application for review, does not adversely affect any of the permittee's interests and the permittee is, therefore, no longer an interested party in the proceedings

Peabody Coal Co. (Appellant) v. The Hopi Tribe & Office of Surface Mining Reclamation & Enforcement (Appellees), 91 IBLA 98 (Feb. 28, 1986)

Where an application to acquire Federal land is rejected by BLM because applicant's declaration of material facts in the application demonstrates conclusively that he is not entitled to the land as a

ADJUDICATION--Continued

matter of law, a subsequent effort on appeal to revise, amend, or deny the facts will not be considered, absent a persuasive explanation of error in the application.

If, when all of the allegations of material fact made by an applicant for a Native allotment are accepted as true, allowance of the application is barred as a matter of law, and the rule of Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), is not applicable. The application is properly rejected without a hearing.

Agnes Mayo Moore, 91 IBLA 383 (Apr. 21, 1986)

ADMINISTRATIVE REVIEW

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the opening because of the potential for unnecessary degradation of cultural resources, the decision will be reversed

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 93 IBIA 5 (Jan. 31, 1986)
93 I.D. 13

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to mitigate any significant environmental impact, the Board will, rather than set aside the grant, remand the case to BLM for inclusion of appropriate stipulations

Sierra Club, Inc., et al., 92 IBLA 299 (June 26, 1986)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF

The Secretary of the Interior is authorized to consider and determine the extent of the public lands. This authority includes the authority to survey parcels conveyed from Federal ownership which border public lands. Where a Government survey of a private claim is challenged, the protestant must establish by clear and convincing evidence the survey is not an accurate portrayal of the lands conveyed.

John Q. Carter, Sr., Verna R. Carter, 90 IBLA 286 (Feb. 13, 1986)

A taxpayer claiming immunity from an Indian tribal tax has the burden of proving entitlement to an exemption.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 86 (Feb. 25, 1986) 93 I.D. 79

HEARINGS

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements.

Santa Fe Pacific Railroad Co., 90 IBLA 289 (Jan. 30, 1986)

When the administrative record does not contain the necessary factual basis for a determination of whether a long-term development lease of Indian trust land should be canceled, the matter will be referred for an evidentiary hearing and recommended decision.

Earle C. Strobe v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 111 (May 21, 1986)

Where lands described in a previously relinquished Native Allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native Allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 380 (June 30, 1986)

RULEMAKING

Under 5 U.S.C. § 552(a)(1) (1982) and the Supreme Court's holding in Morton v. Ruiz, 415 U.S. 199 (1974), an individual may not be adversely affected by a rule required to be published in the Federal Register that is not so published.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

ADMINISTRATIVE PROCEDURE--Continued

STANDING

The intent of the regulations limiting standing to appeal to a party to the case is to afford a rational framework for administrative decisionmaking on the assumption that the initial decisionmaker will have had the benefit of the input of such a party in reaching its decision. Where a party has actively participated in the consideration of an inventory unit for eligibility as a wilderness study area has requested in writing the opportunity to comment on applications for permit to drill (APD's) filed for lands within the unit, and has been recognized by the Bureau of Land Management as a party wishing to have input in the process of adjudicating APD's filed for lands within the unit, it is entitled to notice of the filing of those APD's, and it will be recognized as a party to the case on appeal of decisions granting APD's within the unit.

Utah Wilderness Ass'n, 91 IBLA 124 (Mar. 19, 1986)

ALASKA

ALASKA NATIVE CLAIMS SETTLEMENT ACT

Under the Alaska Native Claims Settlement Act, the key prerequisite to a village corporation's selection of land was the land's availability for withdrawal under sec. 11(a), 43 U.S.C. § 1610(a) (1982). If not so withdrawn, it could not be selected by a village corporation under sec. 12(a), 43 U.S.C. § 1611(a) (1982).

The provision "withdrawn or reserved for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), includes not only lands formally withdrawn but also embraces those lands which have been effectively reserved for such use.

The language "for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), does not create a special category of lands within those under control of the Department of Defense, but rather serves to distinguish lands held by the military from those held by other federal agencies.

Sitnasuak Native Corp., 91 IBLA 86 (Mar. 11, 1986)

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), and utilized as a basis for declaring mining claims null and void ab initio, where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

Maurice E. DeRoer, 91 IBLA 317 (Apr. 15, 1986)

LAND GRANTS AND SELECTIONS

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

ALASKA--Continued

LAND GRANTS AND SELECTIONS--Continued

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Perlia J. Strassburg, Wilford D. Strassburg, 92 IBLA 1 (Apr. 30, 1986)

BLM may properly declare a mining claim null and void ab initio where it was located at a time when the land was segregated from mineral entry pursuant to 43 CFR 2627.4(b) by virtue of the filing of a state selection application, and there is no evidence that the claim is an amendment of a location which predates that filing.

Rodney D. Jackson, Vernon E. Griffin, 92 IBLA 87 (May 29, 1986)

NATIVE ALLOTMENTS

Prior to the adoption of ANILCA, the mere approval of a Native allotment application did not remove the Department's jurisdiction to reexamine entitlement to an allotment at any time prior to the date the "Native Allotment" is actually issued.

The legislative approval provisions of sec. 905 of ANILCA apply to Native allotment applications which were approved by BLM prior to the passage of ANILCA if the "Native Allotment" had not yet issued.

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision dismissing his protest under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest on procedural grounds.

Eugene M. Witt, 90 IBLA 265 (Jan. 31, 1986)

Whenever the Secretary of the Interior makes any conveyance of land under any of the public land laws, he may reserve a right-of-way for trails within the National Trails System to the extent he deems necessary to carry out the purposes of the National Trails System Act, 16 U.S.C. § 1241 (1982).

The Bureau of Land Management may issue a certificate of allotment subject to a continued right of public access along a segment of the Iditarod National Historic Trail crossing through allotment lands. Such a conveyance is an exercise of the discretion vested in the Secretary pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 - 270-3 (1970).

In the absence of legislative approval of a Native allotment, title to the land in an approved allotment application rests with the United States and does not pass to the Native until the land described therein has been surveyed and a "Native Allotment" issued. Therefore, 25 CFR 169.3, which requires that the Secretary obtain written consent from Indians prior to granting a right-of-way across Indian land, does not apply to approved Native allotment applications prior to survey and issuance of the "Native Allotment."

In the absence of a dispute as to a material fact, the due process rights of an applicant for a Native allotment are satisfied by an appeal to the Board of Land Appeals.

Edward A. Nickoli, 90 IBLA 273 (Feb. 5, 1986)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

The effect of a timely filed protest under sec. 905(a)(5)(C) of ANILCA is to preclude the allotment application from being subject to approval under sec. 905(a)(1) and to leave it within previously established administrative procedures to determine compliance with the Native Allotment Act

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision approving a Native allotment application under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest for procedural reasons

Eugene M. Witt, 90 IBLA 330 (Feb. 26, 1986)

Where an interim conveyance to a Native village corporation under sec. 22(j) of ANCSA, 43 U.S.C. § 1621(j) (1982), is made after enactment of ANILCA, such a conveyance may not be considered a valid existing right under sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), and a relinquished Native allotment application may constitute a valid existing right under sec. 22(j) of ANCSA, if the applicant can establish that his relinquishment was involuntary and unknowing

Peter John, 91 IBLA 305 (Apr. 15, 1986)

Where an application to acquire Federal land is rejected by BLM because applicant's declaration of material facts in the application demonstrates conclusively that he is not entitled to the land as a matter of law, a subsequent effort on appeal to revise, amend, or deny the facts will not be considered, absent a persuasive explanation of error in the application.

Secretarial Order No 3080 of May 25, 1979, requires the commencement of use and occupancy or the filing of a Native allotment application prior to a withdrawal of the land.

If, when all of the allegations of material fact made by an applicant for a Native allotment are accepted as true, allowance of the application is barred as a matter of law, and the rule of Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), is not applicable. The application is properly rejected without a hearing.

Agnes Mayo Moore, 91 IBLA 383 (Apr. 21, 1986)

A Native allotment application filed pursuant to sec. 1 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 (1970), is properly denied where the applicant fails to establish her independent use and occupancy as a minor child prior to withdrawal of the claimed land

United States v. Annie Bennett, 92 IBLA 178 (June 11, 1986)

Where lands described in a previously relinquished Native Allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native Allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 380 (June 30, 1986)

POSSESSORY RIGHTS

Trespass cabins located within Tuxedni National Wildlife Refuge are not eligible for continued private use, and special use permits for such use may not be issued pursuant to sec. 304 of the Alaska National Lands Conservation Act of 1980. The construction and occupancy of structures in trespass upon wilderness lands confer no rights which may be asserted against the United States.

Edd J. Perry, Richard E. King, Hansel E. Donoho, 6 OHA 113 (Jan. 2, 1986)

STATEHOOD ACT

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Perlia J. Strassburg, Wilford D. Strassburg, 92 IBLA 1 (Apr. 30, 1986)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

GENERALLY

Trespass cabins located within Tuxedni National Wildlife Refuge are not eligible for continued private use, and special use permits for such use may not be issued pursuant to sec. 304 of the Alaska National Lands Conservation Act of 1980. The construction and occupancy of structures in trespass upon wilderness lands confer no rights which may be asserted against the United States.

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NATIVE ALLOTMENTS

Prior to the adoption of ANILCA, the mere approval of a Native allotment application did not remove the Department's jurisdiction to reexamine entitlement to an allotment at any time prior to the date the "Native Allotment" is actually issued.

The legislative approval provisions of sec. 905 of ANILCA apply to Native allotment applications which were approved by BLM prior to the passage of ANILCA if the "Native Allotment" had not yet issued.

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision dismissing his protest under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest on procedural grounds.

Eugene M. Witt, 90 IBLA 265 (Jan. 31, 1986)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

The effect of a timely filed protest under sec. 905(a)(5)(C) of ANILCA is to preclude the allotment application from being subject to approval under sec. 905(a)(1) and to leave it within previously established administrative procedures to determine compliance with the Native Allotment Act.

"Improvements." As used in sec. 905(a)(5)(C) of ANILCA, the term "improvements" does not carry any special meaning, but rather has its legal meaning in relation to real property. Thus, an improvement must enhance the present value of the land.

A dirt airstrip is an improvement within the meaning of sec. 905(a)(5)(C) of ANILCA.

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision approving a Native allotment application under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest for procedural reasons.

Eugene M. Witt, 90 IBLA 330 (Feb. 26, 1986)

VALID EXISTING RIGHTS

Where an interim conveyance to a Native village corporation under sec. 22(j) of ANCSA, 43 U.S.C. § 1621(j) (1982), is made after enactment of ANILCA, such a conveyance may not be considered a valid existing right under sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), and a relinquished Native allotment application may constitute a valid existing right under sec. 22(j) of ANCSA, if the applicant can establish that his relinquishment was involuntary and unknowing.

Peter John, 91 IBLA 305 (Apr. 15, 1986)

It was error for BLM to reject the recordation of a mining claim, tendered in 1976, upon the subsequent (1983) tentative approval of the lands described therein. Although sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c) (1982), caused all right, title, and interest to the lands to be vested in the State of Alaska upon tentative approval, subject to valid existing rights, that vesting followed the tender of recordation and will not sanction rejection of the tender. Upon the vesting of all right, title, and interest in the State, BLM could no longer adjudicate the validity of a claim located on such lands.

Jonnie A. Wasey, Harold T. McNally, 92 IBLA 228 (June 26, 1986)

ALASKA NATIVE CLAIMS SETTLEMENT ACT

CONVEYANCES

Cemetery Sites and Historical Places

Applications by regional corporations for fee title to historical places pursuant to 43 U.S.C. § 1613(h)(1) (1982) segregate the land from appropriation under the public land laws, including the mining and mineral leasing laws.

K.O.I.L. Associates, 92 IBLA 312 (June 26, 1986)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Interim Conveyance

Where an interim conveyance to a Native village corporation under sec. 22(j) of ANCSA, 43 U.S.C. § 1621(j) (1982), is made after enactment of ANILCA, such a conveyance may not be considered a valid existing right under sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), and a relinquished Native allotment application may constitute a valid existing right under sec. 22(j) of ANCSA, if the applicant can establish that his relinquishment was involuntary and unknowing.

Peter John, 91 IBLA 305 (Apr. 15, 1986)

Valid Existing Rights

Generally

Where lands described in a previously relinquished Native Allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native Allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 380 (June 30, 1986)

NATIVE LAND SELECTIONS

Regional Selections

Generally

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), and utilized as a basis for declaring mining claims null and void ab initio, where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

Pursuant to 43 CFR 2653.2(d), the filing of a Native regional corporation selection under sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), segregates the selected land from all other forms of appropriation under the public land laws, including the mining and mineral leasing laws. The segregative effect of such an application terminates upon final rejection of the application.

When it is not clear whether a regional corporation selection was made only under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1613 (1982) of that Act, a BLM decision declaring certain mining claims null and void ab initio because notation of the selection on the public land records had segregated the land from mining location may be set aside and the case remanded for a determination of the statutory basis for the selection.

Maurice E. DeBoer, 91 IBLA 317 (Apr. 15, 1986)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

NATIVE LAND SELECTIONS--Continued

Regional Selections--Continued

Generally--Continued

When it is not clear whether a regional corporation selection was made under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1613 (1982) of that Act, the case may be remanded for a determination of the statutory basis for the selection.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1611 (1982), thereby rendering mining claims located thereafter null and void ab initio, where neither the Act nor the implementing regulations of the Department provide that the filing of such a selection application segregates the land from other appropriation.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613 (1982), thereby rendering mining claims located thereafter null and void ab initio, in the absence of a master title plat or other land use record entry depicting that the application was filed under that statutory authority.

Nancy Hollingsworth, 92 IBLA 358 (June 30, 1986)

Village Selections

Under the Alaska Native Claims Settlement Act, the key prerequisite to a village corporation's selection of land was the land's availability for withdrawal under sec. 11(a), 43 U.S.C. § 1611(a) (1982). If not so withdrawn, it could not be selected by a village corporation under sec. 12(a), 43 U.S.C. § 1611(a) (1982).

The provision "withdrawn or reserved for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), includes not only lands formally withdrawn but also embraces those lands which have been effectively reserved for such use.

The language "for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), does not create a special category of lands within those under control of the Department of Defense, but rather serves to distinguish lands held by the military from those held by other federal agencies.

Sitnasuak Native Corp., 91 IBLA 86 (Mar. 11, 1986)

APPEALS

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of the notice of appeal is jurisdictional, and failure to file an appeal within the time allowed requires its dismissal.

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR

APPEALS--Continued

4.401(c) more than 30 days prior to the filing of the notice of appeal

Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173 (Jan. 21, 1986)

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with a district office of BLM, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Ekluton, Inc., 90 IBLA 186 (Jan. 30, 1986)

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Morgan Underwood, Sr. v. Deputy Ass't. Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

Where an application to acquire Federal land is rejected by BLM because applicant's declaration of material facts in the application demonstrates conclusively that he is not entitled to the land as a matter of law, a subsequent effort on appeal to revise, amend, or deny the facts will not be considered, absent a persuasive explanation of error in the application.

Agnes Mayo Moore, 91 IBLA 383 (Apr. 21, 1986)

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

United States v. Fletcher De Pitcher et al., 92 IBLA 226 (June 20, 1986)

A notice of appeal must be filed within the time limits provided in 43 CFR 4.411(a). Failure to file an appeal within the time allowed requires dismissal of the appeal

D. L. & Norma Jean Newman et al., 92 IBLA 318 (June 26, 1986)

APPLICATIONS AND ENTRIES

RELINQUISHMENT

Where lands described in a previously relinquished Native Allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native Allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

APPRAISALS

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Jim Doering, 91 IBLA 171 (Mar. 29, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a showing of error that the appraisal methods used by BLM are incorrect, an appraisal may be rebutted only by another appraisal

Horizon Communications, 91 IBLA 399 (Apr. 30, 1986)

BOARD OF INDIAN APPEALS

GENERALLY

The due process requirements of the Fifth Amendment to the United States Constitution are met through the administrative review afforded by the Board of Indian Appeals.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 66 (Feb. 25, 1986) 93 I.D. 70

JURISDICTION

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Morgan Underwood, Sr. v. Deputy Ass't. Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

The Board of Indian Appeals is not the proper forum in which to challenge a tribal ordinance as being violative of the guarantee of equal protection of the laws as provided in the Indian Civil Rights Act.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 86 (Feb. 25, 1986) 93 I.D. 79

The Board of Indian Appeals has jurisdiction over decisions issued by Bureau of Indian Affairs officials under Chapter I of 25 CFR. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

Vance Gillette, Margaret S. Wilson, & Frank Talker v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 14 IBIA 71 (Feb. 26, 1986)

The Board of Indian Appeals does not have authority to change a duly promulgated regulation of the Department or to declare it invalid.

David Schappy, Sr., et al. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 109 (Apr. 8, 1986) 93 I.D. 176

BOARD OF LAND APPEALS

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The Board of Land Appeals has well established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co.; the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

Starrigan Co., Inc., 91 IBLA 117 (Mar. 17, 1986)

Where BLM publishes in the Federal Register notice of intent to file a plat of dependent resurvey and omitted lands survey and subsequently, in response to objections, publishes notice in the Federal Register of the staying of the filing stating the plat will not be filed "until the day after all protests have been resolved or subsequent appeals have been decided by the Interior Board of Land Appeals," yet proceeds to file the plat prior thereto and without further notification to the public, on appeal the Board of Land Appeals will vacate such filing.

Lawyers Title Insurance Corp., 92 IBLA 162 (June 6, 1986)

BUREAU OF INDIAN AFFAIRS

ADMINISTRATIVE APPEALS

Generally

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

The Bureau of Indian Affairs and its officials are subject to the limitations imposed on the Federal Government by the United States Constitution.

The due process requirements of the Fifth Amendment to the United States Constitution are met through the administrative review afforded by the Board of Indian Appeals.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 86 (Feb. 25, 1986) 93 I.D. 79

Except as otherwise specified, the use of Secretarial authority delegated to Bureau of Indian Affairs' agency superintendents is subject to the administrative review procedure set forth in 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

Jacqueline Parsons v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 79 (Mar. 18, 1986)

Filing

Mandatory Time Limit

Regulations promulgated by the Bureau of Indian Affairs in 25 CFR 2.10 establish a 30-day period for filing notices of appeal.

Jacqueline Parsons v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 79 (Mar. 18, 1986)

Tanana Chiefs' Conference, Inc. v. Area Director, Juneau Area Office, Bureau of Indian Affairs, 14 IBIA 87 (Apr. 8, 1986)

BUREAU OF LAND MANAGEMENT

The Bureau of Land Management may properly issue a notice of an incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations for each calendar month, beginning with the month in which drilling operations were initiated.

Sonort Oil Co., Inc., 91 IBLA 137 (Mar. 28, 1986)

Failure to obtain written approval prior to initial drilling, plug-back, or recompletion drilling operations violates provisions both of 25 CFR 211.29 and 30 CFR 221.21(b) (1982). Whether a penalty should be assessed under provision of 25 CFR 211.22 or 30 CFR 221 requires interpretation of both the regulatory scheme and the oil and gas lease affected. Departmental regulations implementing the Indian Mineral Leasing Act are found to have specific and primary application in cases involving Indian lands leased for oil and gas.

Where a lessee of Indian lands commences drilling operations without written approval, penalties assessed

BUREAU OF LAND MANAGEMENT--Continued

must be reasonably related to the nature of the prohibited conduct. Maximum penalties should not be imposed if mitigating circumstances are present. Pursuant to provision of 25 CFR 211.22, the amount of penalty to be imposed is committed to the sound exercise of agency discretion.

Determination of the proper amount to be assessed as a penalty for violation of the provisions of 25 CFR subpart 211 is committed to the sound discretion of the agency and is governed by considerations of fairness applied to the individual facts of each violation.

William Perlman, 91 IBLA 208 (Apr 2, 1986)
93 I.D 159

The Bureau of Land Management may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal a valve, as required by 43 CFR 3162.7-8(b)(1).

Lyco Energy Corp., 92 IBLA 81 (May 27, 1986)

Where lands described in a previously relinquished Native Allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native Allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

COAL LEASES AND PERMITS

APPLICATIONS

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and, thus, is a protest.

When one files a coal lease application citing the leasing on application regulations in 43 CFR Subpart 3425, but in a subsequent submission declares that he will be using the coal for domestic energy needs, a conflict arises because one seeking coal for such a use must acquire a license to mine in accordance with 43 CFR Subpart 3449.

Randall J. Gerlach, 90 IBLA 338 (Feb. 26, 1986)

DILIGENCE

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1982), requires that any coal lease not producing in commercial quantities at the end of 10 years be terminated. No suspension of this

COAL LEASES AND PERMITS--Continued

DILIGENCE--Continued

obligation to commence production is authorized by statute or regulation.

Mountain States Resources Corp., 92 IBLA 188 (June 12, 1986)
93 I.D 239

LEASES

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms. Terms and conditions which are mandated by statute and regulation or are necessary for proper administration of public lands must be included in a readjusted lease.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

Gulf Oil Corp., The Pittsburgh & Midway Coal Mining Co., 91 IBLA 93 (Mar. 13, 1986)

READJUSTMENT

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms. Terms and conditions which are mandated by statute and regulation or are necessary for proper administration of public lands must be included in a readjusted lease.

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A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

Gulf Oil Corp., The Pittsburgh & Midway Coal Mining Co., 91 IBLA 93 (Mar. 13, 1986)

COAL LEASES AND PERMITS--Continued

ROYALTY

A petition to waive rentals and reduce production royalties required by a coal lease shall contain the information set forth at 43 CFR 3485.2. The authorized officer may either reject a petition not meeting the criteria set forth in the regulation or request additional data.

A lessee meeting the waiver, suspension, or reduction of rental or minimum royalty, or the reduction of production royalty must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms.

Mountain States Resources Corp., 92 IBLA 184 (June 12, 1986) 93 I.D. 239

ROYALTY

A petition to waive rentals and reduce production royalties required by a coal lease shall contain the information set forth at 43 CFR 3485.2. The authorized officer may either reject a petition not meeting the criteria set forth in the regulation or request additional data.

A lessee meeting the waiver, suspension, or reduction of rental or minimum royalty, or the reduction of production royalty must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms.

Mountain States Resources Corp., 92 IBLA 184 (June 12, 1986) 93 I.D. 239

SUSPENSION OF OPERATIONS AND PRODUCTION

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1982), requires that any coal lease not producing in commercial quantities at the end of 10 years be terminated. No suspension of this obligation to commence production is authorized by statute or regulation.

Mountain States Resources Corp., 92 IBLA 184 (June 12, 1986) 93 I.D. 239

COLOR OR CLAIM OF TITLE

APPLICATIONS

BLM may properly reject a color-of-title application filed pursuant to sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the document relied upon as initiating color of title does not on its face purport to convey the claimed land, regardless of whether a contemporaneous county survey included the land in the conveyance and claimant has subsequently occupied the land.

Dale P. Pettis, 93 IBLA 327 (Feb. 25, 1986)

COLOR OR CLAIM OF TITLE--Continued

DESCRIPTION OF LAND

BLM may properly reject a color-of-title application filed pursuant to sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the document relied upon as initiating color of title does not on its face purport to convey the claimed land, regardless of whether a contemporaneous county survey included the land in the conveyance and claimant has subsequently occupied the land.

Dale P. Pettis, 93 IBLA 327 (Feb. 25, 1986)

COMMUNICATION SITES

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Jim Bowring, 91 IBLA 377 (Mar. 28, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a showing of error that the appraisal methods used by BLM are incorrect, an appraisal may be rebutted only by another appraisal.

Horizon Communications, 91 IBLA 399 (Apr. 30, 1986)

CONSTITUTIONAL LAW

GENERALLY

The Bureau of Indian Affairs and its officials are subject to the limitations imposed on the Federal Government by the United States Constitution.

The due process requirements of the Fifth Amendment to the United States Constitution are met through the administrative review afforded by the Board of Indian Appeals.

A tax ordinance passed by an Indian tribe does not unduly burden interstate commerce if it applies to an activity with a substantial nexus with the tribe, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the tribe.

Constitutional proscriptions, such as those contained in the Fifth and Fourteenth Amendments to the United States Constitution, that limit the exercise of Federal and state governmental powers, are not applicable to Indian tribes except to the extent they are explicitly endorsed by a tribal constitution or imposed by Congress.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 15 IBLA 86 (Feb. 25, 1986) 93 I.D. 79

CONSTITUTIONAL LAW--Continued

GENERALLY--Continued

The Board of Land Appeals does not have authority to declare acts of Congress unconstitutional. If an enactment of Congress is in conflict with the United States Constitution, it is for the Judicial Branch to so declare

Pierminas Co., Inc., 91 IBLA 117 (Dec. 17, 1986)

DUE PROCESS

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements

Santa Fe Pacific Railroad Co., 90 IBLA 280 (Jan. 29, 1986)

In the absence of a dispute as to a material fact, the due process rights of an applicant for a Native allotment are satisfied by an appeal to the Board of Land Appeals

Edward A. Nicholi, 90 IBLA 271 (Feb. 5, 1986)

The text of FLPMA itself provides a mining claimant with effective notice of the annual filing requirements. Individualized notices of filing deadlines are not required by the Constitution.

Thurman Oil & Mining Co., 90 IBLA 382 (Feb. 24, 1986)

CONTESTS AND PROTESTS

GENERALLY

Prior to the adoption of ANILCA, the mere approval of a Native allotment application did not remove the Department's jurisdiction to reexamine entitlement to an allotment at any time prior to the date the "Native Allotment" is actually issued

The legislative approval provisions of sec. 905 of ANILCA apply to Native allotment applications which were approved by BLM prior to the passage of ANILCA if the "Native Allotment" had not yet issued.

Eugene M. Witt, 90 IBLA 265 (Jan. 31, 1986)

The effect of a timely filed protest under sec. 905(a)(5)(C) of ANILCA is to preclude the allotment application from being subject to approval under sec. 905(a)(1) and to leave it within previously established administrative procedures to determine compliance with the Native Allotment Act

Eugene M. Witt, 90 IBLA 339 (Feb. 26, 1986)

CONTRACTS

CONSTRUCTION AND OPERATION

Rights of Parties

A monetary claim by the Government against a contractor for the failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1981-7-87 (Feb. 11, 1988) 95 I.D. 77

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the joint spacing of the pipe at the expense of maintaining the pipe grade requirement

Appeal of Western Contracting Corp., IBCA-1961 (Mar. 6, 1986)

A Government purchase order is merely an offer to purchase and does not become a contract until accepted by the contractor. The burden is on the contractor to prove acceptance by substantial performance. Where a purchase order contemplates the immediate repair of an electric motor needed for ongoing construction, under emergency circumstances known to the repairer, acceptance consists in the actual performance of the needed repairs; and the Government is not liable for any labor or material costs incurred if the repairs are not timely or successfully performed and the Government derives no benefit from the unsuccessful repairer's efforts.

Appeal of J & C Electric Motor Service, IBCA-2944 (Apr. 17, 1986)

Where the Government enters into a firm fixed-price contract for the construction of a fence that is to be completed within 2[illegible] days after the contractor's receipt of a notice to proceed, and 10-1/2 months elapse without performance in circumstances where the Government's repeated notices to proceed or to resume work are not picked up by the contractor from its post office box, the Government is justified in terminating the contract for default even though the contractor alleges illness or failure to receive the notices for a part of the period during which performance should have occurred

Appeal of Security Fence Co., IBCA-2977 (Apr. 23, 1986)

Construction and Operation--Continued

Differing Site Conditions--Continued

Mere allegations by a contractor that a DOD inspector ordered the performance of extra work in connection with a contract for the hauling of timber cleared on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dave Cochran, IBCA-1790 (Mar. 31, 1986)

Allowable Costs

Except for correction of a mathematical error in the contracting officer's decision, a contractor's claim for additional settlement costs under an architect-engineer contract terminated for the convenience of the Government is denied, where the appellant failed to show by a preponderance of the evidence that a subsistence schedule contained in the contract should not be used in determining the amount of the termination settlement to which the contractor is entitled. The appellant also failed to substantiate the amount claimed as subcontractor settlement costs.

PBQ, Inc., IBCA-1992 (Jan. 23, 1986)

Where, in the context of a $26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Briticraft Corp., IBCA-1814 (Jan. 31, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Dallas Affiliates, Inc., IBCA-1961 (Feb. 18, 1986)

CONTRACTS

Construction and Operation--Continued

Allowable Costs--Continued

A contractor's claim for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal officer to justify making any adjustments other than already allowed by the contracting officer.

Rockhold Construction Co., Inc., IBCA-1648-3-83 et al. (Mar. 17, 1986)

The Board finds disallowed costs under a cost-reimbursable contract with an educational institution to be allowable where additional documentation provided the contracting officer indicated that the disallowances resulted from occasional lapses, errors, or omissions in an otherwise accurate accounting system and that the contracting officer had not exercised his independent judgment to review such evidence respecting costs questioned by the auditor.

Appeal of Louisiana State University, IBCA-2357 (Mar. 31, 1986) 93 I.D. 179

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is not expressly included, or is arguably inadequately included, in the specific pay items of the contract.

Hall, Hall & Brosmer, Inc., & Hall & Brosmer (JV), IBCA-1966-3-87 (Mar. 26, 1986) 93 I.D. 180

Changed Conditions (Differing Site Conditions)

A contractor's claim for additional compensation on the basis of changed site conditions will be denied where the sole basis for the claim is unanticipated costs allegedly incurred by the contractor as a result of a County decision to enforce existing vehicle weight restrictions that precluded the use of premixed concrete trucks on the only access road to the project site. It is immaterial whether the Government's own actions may have precipitated the County's enforcement decision. Liquidated damages are properly assessed when the contract provision authorizing their assessment is reasonable, and the contractor fails to show that the delay in the completion of the work arose from unforeseeable causes beyond its control and without fault or negligence on its part.

Appeal of Dock Storehouse d/b/a Storehouse Painting, IBCA-2087 (May 22, 1986)

Changes and Extras

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive to accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be

greater in the current records of the licensed land carrier.

When the parties differ as to the amount payable as an equitable adjustment for reverse quantities of soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.204-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he certified support the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 8 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 8-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside duals and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting soil-cement outside the 8-foot width shown on the plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or

CONTRACTS

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

the semi-pervious portion of the inclined bank) as slippery or slick.

Kingsville General Contractors Co., Inc., IBCA-1085-6-69 (Feb. 11, 1970) 77 I.D. 37

Under a dam rehabilitation contract containing unit prices for construction items, where the Government claims it is entitled to a downward equitable adjustment on change order work but fails to offer any persuasive evidence in support of the revised unit prices contended for, the Board finds that the Government has failed to sustain its burden of proof.

L. H. Ingal, IBCA-1023 (Feb. 27, 1970) 77 I.D. 92

Where a contractor sufficiently identified specific delays in the Government's responses to requests for change orders, the Board held that the contractor was entitled to a 210-day extension of the contract performance time even though there were other delays for which the Government and the contractor were concurrently responsible and other delays for which the contractor was solely responsible.

Appeal of Wichhap Contracting Co., Inc., IBCA-1091-8-70 (Mar. 31, 1970)

Where a road removing contractor bids on the basis of a visual inspection indicating a limited number of road surface spots needing patching before resurfacing, and that number is reasonably consistent with the number that is estimated by the project engineer, but at the preconstruction conference after the award the contractor is alerted for the first time to the possibility of roadbed failure, and it subsequently experiences such failure, being required to use 2,272 tons of asphalt for patching rather than the 285 tons it had estimated or the 285 tons the project engineer had estimated, it is entitled to compensation under the differing site conditions clause not only for the extra asphalt used, but also for the additional labor and machinery costs incurred in connection with the patching.

Appeal of Yazzie Construction Co., IBCA-2154 (Apr. 30, 1986) 93 I.D. 191

Mere allegations by a contractor that a BLM inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dave Cochran, IBCA-1709 (May 23, 1986)

Construction and Operation--Continued

Construction Against Specifications

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1603-7-87 (Feb. 11, 1988) 93 I.B. 27

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1988)

Contract Clauses

Where, in the context of a $26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brinderson Corp., IBCA-1814 (Jan. 31, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from

CONTRACTS

Construction and Operation--Continued

Contract Clauses--Continued

the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1988)

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by the contract, even though such work is not expressly included, or is arguably inadequately included, in the specific pay items of the contract.

Ball, Ball & Brosamer, Inc., Ball & Brosamer III, IBCA-1944-3-87 (Mar. 25, 1988) 95 I.D. 144

Bare allegations by a contractor that a BLM inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dave Cochran, IBCA-1799 (May 23, 1986)

Contracting Officer

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1603-7-87 (Feb. 11, 1988) 93 I.B. 27

Termination of a tree-thinning contract for default was held to be improper because the Government's failure to discharge its bid-verification responsibilities warranted rescission of the contract. The Board found that the actions of the parties constituted "mutual fault," where the contractor abandoned performance of the work in a case involving an admitted mistake in judgment in bidding the contract, the contracting officer failed to request verification of the bid price in light of the wide range of bids received,

and the disparity between the contract bid price and the Government's estimate for the work.

Appeal of Don Plummer, IBCA-2059 (Feb. 28, 1990) 90 I.B. 74

The Board finds disallowed costs under a cost-reimbursable contract with an educational institution to be allowable where additional documentation provided the contracting officer indicated that the disallowances resulted from occasional lapses, errors, or omissions in an otherwise accurate accounting system and that the contracting officer had not exercised his independent judgment to review such evidence respecting costs questioned by the auditor.

Appeal of Louisiana State University, IBCA-2057 (Mar. 21, 1990) 90 I.B. 179

Under a guaranteed minimum quantity contract, where the Government failed to order the minimum quantities and the contractor agreed to extend the contract for 30 days without additional consideration on condition that a CPFF follow-on contract be negotiated, that payment be made for the minimum quantities, and that limited requirements be ordered during the 30-day extension, the Board finds that the extended contract was constructively terminated for convenience and that the payment for the minimum quantities was outside the authority of the contracting officer and must be repaid to the Government as a mistaken payment.

Appeal of Marine Corp., IBCA-1829 (Apr. 1, 1986) 93 I.B. 151

Contractor

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is not expressly included, or is arguably inadequately included, in the specific pay items of the contract.

Ball, Ball & Brosamer, Inc., & Ball & Brosamer (JV), IBCA-1566-3-82 (Mar. 25, 1986) 93 I.B. 188

Differing Site Conditions (Changed Conditions)

A contractor's claims for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal officer to justify making any adjustments other than already allowed by the contracting officer.

Rechtold Construction Co., Inc., IBCA-1660-3-83 et al. (Mar. 13, 1986)

Where a road repaving contractor bids on the basis of a visual inspection indicating a limited number of road surface spots needing patching before resurfacing, and that number is reasonably consistent with the number that is estimated by the project engineer, but at the preconstruction conference after the award the

contractor is alerted for the first time to the possibility of roadbed failure, and it subsequently experiences such failure, being required to use 2,272 tons of asphalt for patching rather than the 350 tons it had estimated or the 300 tons the project engineer had estimated, it is entitled to compensation under the differing site conditions clause not only for the extra asphalt used, but also for the additional labor and machinery costs incurred in connection with the patching.

Appeal of Textile Constructor Co., IBCA-2104 (Apr. 27, 1988) 95 I.B. 191

Drawings and Specifications

Where, in the context of a $26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Briederson Corp., IBCA-1918 (Jan. 31, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided

Indian Affiliates, Inc., IBCA-1861 (Feb. 19, 1986)

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the joint spacing of the pipe at the expense of maintaining the pipe grade requirement.

Appeal of Western Contracting Corp., IBCA-1961 (Mar. 4, 1986)

Changes and Changed

Where a contractor sufficiently identified specific delays in the Government's responses to requests for change orders, the Board held that the contractor was entitled to a 999-day extension of the contract performance time even though there were other delays for which the Government and the contractor were concurrently responsible and other delays for which the contractor was solely responsible.

When the Board found that a contractor was entitled to additional contract performance time as a result of Government-caused delays, it was not permissible to impose liquidated damages prior to the end of the additional period of performance which extended to the date of beneficial occupancy. The Government estimated that 5 percent of the contract work remained at beneficial occupancy, which made that event the equivalent of substantial completion. The Board follows the rule that liquidated damages may not be imposed after substantial completion so the entire amount of liquidated damages was remanded.

Appeal of Richlan Contracting Co., Inc., IBCA-1991-8-86 (Mar. 31, 1986)

Changes and Changed Conditions

Where, in the context of a $34 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brinderson Corp., IBCA-1914 (Jan. 31, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is

not expressly included, or is arguably inadequately included, in the specific pay items of the contract.

Bell, Bell & Brockway, Inc., 4 Bell & Brockway ¶71, IBCA-1944-9-85 (Mar. 24, 1986) 93 I.D. 144

Delay and Pacing

Except for correction of a mathematical error in the contracting officer's decision, a contractor's claim for additional settlement costs under an architect-engineer contract terminated for the convenience of the Government is denied, where the appellant failed to show by a preponderance of the evidence that a submission schedule contained in the contract should not be used in determining the amount of the termination settlement to which the contractor is entitled. The appellant also failed to substantiate the amount claimed as subcontractor settlement costs.

FKB, Inc., IBCA-1942 (Jan. 23, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

Where a road repaving contractor bids on the basis of a visual inspection indicating a limited number of road surface spots needing patching before resurfacing, and that number is reasonably consistent with the number that is estimated by the project engineer, but at the preconstruction conference after the award the contractor is alerted for the first time to the possibility of roadbed failure, and it subsequently experiences such failure, being required to use 2,272 tons of asphalt for patching rather than the 250 tons it had estimated or the 280 tons the project engineer had estimated, it is entitled to compensation under the differing site conditions clause not only for the extra asphalt used, but also for the additional labor and machinery costs incurred in connection with the patching.

Appeal of Jarvis Construction Co., IBCA-2198 (Apr. 30, 1986) 93 I.D. 191

Waiver and Estoppel

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining

CONSTRUCTION AND OPERATION--Continued

Delay and Disruption--Continued

to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1681-7-82 (Feb. 13, 1986) 93 I.B. 27

CONTRACT DISPUTES ACT OF 1978

Interest

Where a contract settlement arrived at pursuant to a termination for the convenience of the Government expressly omits any provision for the payment of interest on the amount of the agreement, the contractor is entitled to interest on the settlement amount from the date of its certification of the claim until the date payment of the settlement amount is made, notwithstanding the provisions of 41 CFR 1-8.212-2(c) (1981) and subsequent similar provisions which preclude interest on normal termination settlements.

Power City Construction, Inc., IBCA-1839 (Mar. 17, 1986) 93 I.B. 131

A Government motion to dismiss an appeal for lack of jurisdiction on the ground that the contractor had failed to certify the claim to the contracting officer as required by the Contract Disputes Act is denied where the Board finds that after the appeal was taken appellant did substantially comply with the requirements of the Act by certifying the claim in the manner required and presenting the claim so certified to the contracting officer in the course of settlement discussions who advised appellant that it was only entitled to the amount found to be due in the decision previously rendered on the uncertified claim. Interest on any amount determined to be due appellant on its claims is to be computed from the date the claims were found to have been properly certified to the contracting officer.

Appeal of Salisbury & Dietz, Inc., IBCA-2090 (June 20, 1986) 93 I.B. 259

Jurisdiction

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1681-7-82 (Feb. 13, 1986) 93 I.B. 27

A claim presented for the first time in the Complaint is dismissed since under the Contract Disputes Act of 1978 the presentation of a claim to the contracting officer for decision is a prerequisite to the Board exercising its appellate jurisdiction.

Appeal of Champion Timberland Services, Inc., IBCA-2041 (Feb. 28, 1986)

In a case where an Indian tribe moves to dismiss appeals for lack of jurisdiction in the Board where the Government claims for repayment of disallowed costs under cost-reimbursement contracts, the Board finds the Contract Disputes Act of 1978 to be inapplicable to contracts awarded under Public Law 93-638, but finds the Board has jurisdiction under a delegation of authority from the Secretary and the agreement of the parties under a disputes clause in the contracts. The claim of sovereign immunity by the tribe is found to relate to enforcement of any decision finding the tribe liable to the Government, and does not affect Board jurisdiction over the claims.

Appeals of Papago Indian Tribe of Arizona, IBCA-1961-2, 1964 (Mar. 17, 1986) 93 I.B. 176

A Government motion to dismiss an appeal for lack of jurisdiction on the ground that the contractor had failed to certify the claim to the contracting officer as required by the Contract Disputes Act is denied where the Board finds that after the appeal was taken appellant did substantially comply with the requirements of the Act by certifying the claim in the manner required and presenting the claim so certified to the contracting officer in the course of settlement discussions who advised appellant that it was only entitled to the amount found to be due in the decision previously rendered on the uncertified claim. Interest on any amount determined to be due appellant on its claims is to be computed from the date the claims were found to have been properly certified to the contracting officer.

Appeal of Salisbury & Dietz, Inc., IBCA-2090 (June 20, 1986) 93 I.B. 259

Where a contractor files a notice of appeal with the Board, from a decision of a contracting officer terminating the contract for default, more than a year after the decision was received by the contractor, the Board holds that the appeal is not within its jurisdiction to consider because of failure to comply with the 90-day rule for filing appeals to Boards of Contract Appeals, as provided in sec. 7 of the Contract Disputes Act of 1978.

Appeal of C. S. Norton Co., Inc., IBCA-2068 (June 24, 1986) 93 I.B. 259

Disputes and Remedies

General

Where a contract settlement arrived at pursuant to a termination for the convenience of the Government expressly omits any provision for the payment of interest on the amount of the agreement, the contractor is entitled to interest on the settlement amount from the date of its certification of the claim until the date payment of the settlement amount is made, notwithstanding the provisions of 41 CFR 1-1.313-2(c) (1981) and subsequent similar provisions which preclude interest on normal termination settlements.

Power City Construction, Inc., IBCA-1819 (Mar. 12, 1986) 93 I.D. 131

A contractor's claim for additional compensation on the basis of changed site conditions will be denied where the sole basis for the claim is anticipated costs allegedly incurred by the contractor as a result of a County decision to enforce existing vehicle weight restrictions that precluded the use of transit concrete trucks on the only access road to the project site. It is immaterial whether the Government's own actions may have precipitated the County's enforcement decision. Liquidated damages are properly assessed when the contract provision authorizing their assessment is reasonable, and the contractor fails to show that the delay in the completion of the work arose from unforeseeable causes beyond its control and without fault or negligence on its part.

Appeal of Jack Workhouse d/b/a Workhouse Painting, IBCA-2087 (May 22, 1986)

Burden of Proof

Except for corrections of a mathematical error in the contracting officer's decision, a contractor's claim for additional settlement costs under an architect-engineer contract terminated for the convenience of the Government is denied, where the appellant failed to show by a preponderance of the evidence that a submission schedule contained in the contract should not be used in determining the amount of the termination settlement to which the contractor is entitled. The appellant also failed to substantiate the amount claimed as subcontractor settlement costs.

PBP, Inc., IBCA-1902 (Jan. 23, 1986)

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.205-6 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support

Disputes and Remedies--Continued

Burden of Proof--Continued

the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 4 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 8-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside duals and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting soil-cement outside the 8-foot width shown on the plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or the semi-pervious portion of the inclined bank) as slippery or slick.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

A claim against a contractor for damages asserted under the Termination For Default--Damages For Delay--Time Extension Clause is sustained when the contractor failed or refused to complete the work covered by a mop-up and fireline services contract and the amount charged against the contractor for completion of the work remaining with Government forces represents a reasonable measure of the damages sustained by the Government as a result of the contractor's failure to complete the contract work.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

Upon finding that a notice of award was signed by the contracting officer and mailed to the contractor on the same day that the contractor mailed a notice of mistake in bid, including a request to withdraw the bid, to the contracting officer; that both documents were received by the respective addressees on the same day, five days later; that the bid form provided for acceptance by mailing or otherwise furnished within a specified time; and that the contracting officer was in good faith accepting the bid and had no apparent reason to suspect that a bid mistake had been made; the Board holds: that the contractor has failed to sustain its burden of proof to establish entitlement to relief from the mistake, since the law is well settled that a notice of award is effective on the date mailed--if mailing is permitted by the bid document--constitutes an acceptance of an offer, and results in a binding contract; while a notice of mistake in bid and request for withdrawal constitutes an attempt to withdraw an offer to form a contract, or rescind a contract already made, and is not effective until received by the offeree--the contracting officer.

Singleton Contracting Corp., IBCA-1770-1-88 (Mar. 6, 1986) 93 I.B. 127

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the joint spacing of the pipe at the expense of maintaining the pipe grade requirement.

Appeal of Western Contracting Corp., IBCA-1961 (Mar. 6, 1986)

A contractor's claims for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal officer to justify making any adjustments other than already allowed by the contracting officer.

Bechtold Construction Co., Inc., IBCA-1660-3-83 et al. (Mar. 13, 1986)

A Government purchase order is merely an offer to purchase and does not become a contract until accepted by the contractor. The burden is on the contractor to prove acceptance by substantial performance. Where a purchase order contemplates the immediate repair of an electric motor needed for ongoing construction, under emergency circumstances known to the repairer, acceptance consists in the actual performance of the needed repairs; and the Government is not liable for any labor or material costs incurred if the repairs are not timely or successfully performed and the Government derives no benefit from the unsuccessful repairer's efforts.

Appeal of J & C Electric Motor Service, IBCA-2068 (Apr. 17, 1986)

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

Mere allegations by a contractor that a BIA inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dave Cochran, IBCA-1799 (May 23, 1986)

Damages

Actual Damages

A claim against a contractor for damages asserted under the Termination For Default--Damages For Delay--Time Extension Clause is sustained when the contractor failed or refused to complete the work covered by a mop-up and fireline services contract and the amount charged against the contractor for completion of the work remaining with Government forces represents a reasonable measure of the damages sustained by the Government as a result of the contractor's failure to complete the contract work.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

Liquidated Damages

When the Board found that a contractor was entitled to additional contract performance time as a result of Government-caused delays, it was not permissible to impose liquidated damages prior to the end of the additional period of performance which extended to the date of beneficial occupancy. The Government estimated that 5 percent of the contract work remained at beneficial occupancy, which made that event the equivalent of substantial completion. The Board follows the rule that liquidated damages may not be imposed after substantial completion so the entire amount of liquidated damages was rescinded.

Appeal of Richbar Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

A contractor's claim for additional compensation on the basis of changed site conditions will be denied where the sole basis for the claim is unanticipated costs allegedly incurred by the contractor as a result of a County decision to enforce existing vehicle weight restrictions that precluded the use of premixed concrete trucks on the only access road to the project site. It is immaterial whether the Government's own actions may have precipitated the County's enforcement decision. Liquidated damages are properly assessed when the contract provision authorizing their assessment is reasonable, and the contractor fails to show that the delay in the completion of the work arose from unforeseeable causes beyond its control and without fault or negligence on its part.

Appeal of Jack Morehouse d/b/a Morehouse Painting, IBCA-2087 (May 22, 1986)

DISPUTES AND APPEALS--Continued

Equitable Adjustments

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the Government upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the Government survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the Government survey had been performed at an earlier time when conditions prevailing were more conducive to accurate measurements being taken and (ii) the records maintained with respect to the Government survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.705-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 8 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 8-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside dual and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting soil-cement outside the 8-foot width shown on the plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful

CONTRACTS

DISPUTES AND APPEALS--Continued

Equitable Adjustments--Continued

experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board noted that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or the semi-pervious portion of the inclined bank) as slippery or slick.

Riverside General Construction Co., Inc., IBCA-1691-7-82 (Feb. 17, 1986) 93 I.D. 27

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional processing costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

Under a dam rehabilitation contract containing unit prices for construction items, where the Government claims it is entitled to a downward equitable adjustment on change order work but fails to offer any persuasive evidence in support of the revised unit prices contended for, the Board finds that the Government has failed to sustain its burden of proof.

A. D. Frassi Corp., IBCA-1927 (Feb. 27, 1986) 93 I.D. 93

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the joint spacing of the pipe at the expense of maintaining the pipe grade requirement.

Appeal of Western Contracting Corp., IBCA-1961 (Mar. 4, 1986)

A contractor's claims for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal officer to justify making any adjustments other than already allowed by the contracting officer.

Rechtold Construction Co., Inc., IBCA-1668-3-83 et al. (Mar. 13, 1986)

DISPUTES AND APPEALS--Continued

Jurisdiction

A claim presented for the first time in the complaint is dismissed since under the Contract Disputes Act of 1978 the presentation of a claim to the contracting officer for decision is a prerequisite to the Board exercising its appellate jurisdiction.

Appeal of Champion Timberland Services, Inc., IBCA-2041 (Feb. 24, 1986)

In a case where an Indian tribe moves to dismiss appeals for lack of jurisdiction in the Board where the Government claims for repayment of disallowed costs under cost-reimbursement contracts, the Board finds the Contract Disputes Act of 1978 to be inapplicable to contracts awarded under Public Law 93-638, but finds the Board has jurisdiction under a delegation of authority from the Secretary and the agreement of the parties under a disputes clause in the contracts. The claim of sovereign immunity by the tribe is found to relate to enforcement of any decision finding the tribe liable to the Government, and does not affect Board jurisdiction over the claims.

Appeals of Papago Indian Tribe of Arizona, IBCA-1962 & 1966 (Mar. 17, 1986) 93 I.D. 136

Substantial Evidence

Where, in the context of a $26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brinderson Corp., IBCA-1818 (Jan. 31, 1986)

Termination for Convenience

Imposition of excess costs for a reprocurement depend on the validity of the default termination and where the Board found that the Government's attempt to reestablish a completion date was unreasonable pursuant to the DeVito rule, the termination for default was converted to a termination for convenience and the imposition of excess costs was rescinded.

Appeal of Wickham Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

Under a guaranteed minimum quantity contract, where the Government failed to order the minimum quantities and the contractor agreed to extend the contract for 30 days without additional consideration on condition that a CPFF follow-on contract be negotiated, that payment be made for the minimum quantities, and that limited requirements be ordered during the 30-day extension, the Board finds that the extended contract was constructively terminated for convenience and that the payment for the minimum

DISPUTES AND APPEALS--Continued

Termination for Convenience--Continued

quantities was outside the authority of the contracting officer and must be repaid to the Government as a mistaken payment.

Appeal of Helena Corp., IBCA-1929 (Dec. 1, 1986) 93 I.D. 191

Termination for Default

Where the Government enters into a firm fixed-price contract for the construction of a fence that is to be completed within 25 days after the contractor's receipt of a notice to proceed, and 10-1/2 months elapse without performance in circumstances where the Government's repeated notices to proceed or to resume work are not picked up by the contractor from its post office box, the Government is justified in terminating the contract for default even though the contractor alleges illness or failure to receive the notices for a part of the period during which performance should have occurred.

Appeal of Security Fence Co., IBCA-2077 (Dec. 23, 1986)

Generally

Termination of a tree-thinning contract for default was held to be improper because the Government's failure to discharge its bid-verification responsibilities warranted rescission of the contract. The Board found that the actions of the parties constituted "mutual fault," where the contractor abandoned performance of the work in a case involving an admitted mistake in judgment in bidding the contract, the contracting officer failed to request verification of the bid price in light of the wide range of bids received, and the disparity between the contract bid price and the Government's estimate for the work.

Appeal of Don Simpson, IBCA-2058 (Feb. 28, 1986) 93 I.D. 76

Excess Costs

Imposition of excess costs for a reprocurement depend on the validity of the default termination and where the Board found that the Government's attempt to reestablish a completion date was unreasonable pursuant to the DeVito rule, the termination for default was converted to a termination for convenience and the imposition of excess costs was rescinded.

Appeal of Wickham Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

FORMATION AND VALIDITY

Bid Award

Upon finding that a notice of award was signed by the contracting officer and mailed to the contractor on the same day that the contractor mailed a notice of mistake in bid, including a request to withdraw the bid, to the contracting officer; that both documents were received by the respective addressees on the same day, five days later; that the bid form provided for acceptance by mailing or otherwise furnished within a specified time; and that the contracting officer was in good faith accepting the bid and had no apparent reason to suspect that a bid mistake had been made; the Board holds: that the contractor has failed to sustain its burden of proof to establish entitlement to relief from

CONTRACTS

FORMATION AND VALIDITY--Continued

Bid Bond--Continued

the mistake, since the law is well settled that a notice of award is effective on the date mailed--if mailing is permitted by the bid document--constitutes an acceptance of an offer, and results in a binding contract; while a notice of mistake in bid and request for withdrawal constitutes an attempt to withdraw an offer to form a contract, or rescind a contract already made, and is not effective until received by the offeree--the contracting officer.

Singleton Contracting Corp., IBCA-1770-1-85 (Mar. 6, 1986)
93 I.D. 127

The Bureau of Land Management may reject a bid in a competitive lease sale where the bid does not conform to the conditions set out in the lease sale notice. Where a minimum bid of $5 per acre was established by the advertised terms of sale, a bid for $1.39 was properly rejected.

John R. Dohrmann, 93 IBLA 68 (May 22, 1986)

Governing Law

Under a guaranteed minimum quantity contract, where the Government failed to order the minimum quantities and the contractor agreed to extend the contract for 30 days without additional consideration or condition that a CPFF follow-on contract be negotiated, that payment be made for the minimum quantities, and that limited requirements be ordered during the 30-day extension, the Board finds that the extended contract was constructively terminated for convenience and that the payment for the minimum quantities was outside the authority of the contracting officer and must be repaid to the Government as a mistaken payment.

Appeal of Marina Corp., IBCA-1828 (Apr. 1, 1986)
93 I.D. 151

Mistake

Upon finding that a notice of award was signed by the contracting officer and mailed to the contractor on the same day that the contractor mailed a notice of mistake in bid, including a request to withdraw the bid, to the contracting officer; that both documents were received by the respective addressees on the same day, five days later; that the bid form provided for acceptance by mailing or otherwise furnished within a specified time; and that the contracting officer was in good faith accepting the bid and had no apparent reason to suspect that a bid mistake had been made; the Board holds: that the contractor has failed to sustain its burden of proof to establish entitlement to relief from the mistake, since the law is well settled that a notice of award is effective on the date mailed--if mailing is permitted by the bid document--constitutes an acceptance of an offer, and results in a binding contract; while a notice of mistake in bid and request for withdrawal constitutes an attempt to withdraw an offer to form a contract, or rescind a contract already made, and is not effective until received by the offeree--the contracting officer.

Singleton Contracting Corp., IBCA-1770-1-85 (Mar. 6, 1986)
93 I.D. 127

CONTRACTS

PERFORMANCE OR BREACH

Generally

A contractor's claim for additional compensation on the basis of changed site conditions will be denied where the sole basis for the claim is unanticipated costs allegedly incurred by the contractor as a result of a County decision to enforce existing vehicle weight restrictions that precluded the use of premixed concrete trucks on the only access road to the project site. It is immaterial whether the Government's own actions may have precipitated the County's enforcement decision. Liquidated damages are properly assessed when the contract provision authorizing their assessment is reasonable, and the contractor fails to show that the delay in the completion of the work arose from unforeseeable causes beyond its control and without fault or negligence on its part.

Appeal of Jack Morehouse d/b/a Morehouse Painting, IBCA-2087 (May 22, 1986)

Acceptance of Performance

A claim against a contractor for damages asserted under the Termination for Default--Damages for Delay--Time Extension Clause is sustained when the contractor failed or refused to complete the work covered by a mop-up and fireline services contract and the amount charged against the contractor for completion of the work remaining with Government forces represents a reasonable measure of the damages sustained by the Government as a result of the contractor's failure to complete the contract work.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

Mere allegations by a contractor that a BLM inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dave Cochran, IBCA-1799 (May 23, 1986)

Breach

Where the Government enters into a firm fixed-price contract for the construction of a fence that is to be completed within 25 days after the contractor's receipt of a notice to proceed, and 10-1/2 months elapse without performance in circumstances where the Government's repeated notices to proceed or to resume work are not picked up by the contractor from its post office box, the Government is justified in terminating the contract for default even though the contractor alleges illness or failure to receive the notices for a part of the period during which performance should have occurred.

Appeal of Security Fence Co., IBCA-2077 (Apr. 23, 1986)

PERFORMANCE OR DEFAULT--Continued

Excusable Delays

Where a contractor sufficiently identified specific delays in the Government's responses to requests for change orders, the Board held that the contractor was entitled to a 337-day extension of the contract performance time even though there were other delays for which the Government and the contractor were concurrently responsible and other delays for which the contractor was solely responsible.

Appeal of Pitzhan Contracting Co., Inc., IBCA-1381-8-79 (Mar. 31, 1986)

Where the Government enters into a fire fixed-price contract for the construction of a fence that is to be completed within 25 days after the contractor's receipt of a notice to proceed, and 18-1/2 months elapse without performance in circumstances where the Government's repeated notices to proceed or to resume work are not picked up by the contractor from its post office box, the Government is justified in terminating the contract for default even though the contractor alleges illness or failure to receive the notices for a part of the period during which performance should have occurred.

Appeal of Security Fence Co., IBCA-2077 (Apr. 23, 1986)

A contractor's claim for additional compensation on the basis of changed site conditions will be denied where the sole basis for the claim is unanticipated costs allegedly incurred by the contractor as a result of a County decision to enforce existing vehicle weight restrictions that precluded the use of premixed concrete trucks on the only access road to the project site. It is immaterial whether the Government's own actions may have precipitated the County's enforcement decision. Liquidated damages are properly assessed when the contract provision authorizing their assessment is reasonable, and the contractor fails to show that the delay in the completion of the work arose from unforeseeable causes beyond its control and without fault or negligence on its part.

Appeal of Jack Morehouse d/b/a Morehouse Painting, IBCA-2087 (May 22, 1986)

Inspection

Were allegations by a contractor that a BLM inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dace Cochran, IBCA-1799 (May 23, 1986)

Release and Settlement

Where a contract settlement arrived at pursuant to a termination for the convenience of the Government expressly omits any provision for the payment of interest on the amount of the agreement, the contractor is entitled to interest on the settlement amount from the date of its certification of the claim until the date

PERFORMANCE OR DEFAULT--Continued

Release and Settlement--Continued

payment of the settlement amount is made, notwithstanding the provisions of 41 CFR 1-8.212-2(c) (1981) and subsequent similar provisions which preclude interest on normal termination settlements.

Roger City Construction, Inc., IBCA-1839 (Mar. 17, 1986) 93 I.D. 111

Substantial Performance

A Government purchase order is merely an offer to purchase and does not become a contract until accepted by the contractor. The burden is on the contractor to prove acceptance by substantial performance. Where a purchase order contemplates the immediate repair of an electric motor needed for ongoing construction, under emergency circumstances known to the repairer, acceptance consists in the actual performance of the needed repairs; and the Government is not liable for any labor or material costs incurred if the repairs are not timely or successfully performed and the Government derives no benefit from the unsuccessful repairer's efforts.

Appeal of J & C Electric Motor Service, IBCA-2044 (Apr. 17, 1986)

DESERT LAND ENTRY

GENERALLY

Where after weighing all the evidence presented at a hearing in a Government contest of a desert land entry, the Administrative Law Judge determines a desert land entryman failed to irrigate his entry in conformity to his proposed plan of operations as of the date of final proof, the entry is properly cancelled.

United States v. James T. Mills, 91 IBLA 370 (Apr. 28, 1986)

APPLICATIONS

A decision rejecting a desert land entry application will be affirmed where the applicant proposes to irrigate his entry from underground water sources but fails to show that he has acquired a right from the state to appropriate underground water or that he is qualified under state law to obtain the necessary right to appropriate water.

Richard H. Greener, 91 IBLA 285 (Mar. 31, 1986)

WATER RIGHT

A decision rejecting a desert land entry application will be affirmed where the applicant proposes to irrigate his entry from underground water sources but fails to show that he has acquired a right from the state to appropriate underground water or that he is qualified under state law to obtain the necessary right to appropriate water.

Richard H. Greener, 91 IBLA 285 (Mar. 31, 1986)

DESERT LAND ENTRY--Continued

WATER SUPPLY

Where after weighing all the evidence presented at a hearing in a Government contest of a desert land entry, the Administrative Law Judge determines a desert land entryman failed to irrigate his entry in conformity to his proposed plan of operations as of the date of final proof, the entry is properly cancelled.

United States v. Isaac N. Mills, 91 IBLA 370 (Apr. 28, 1986)

ENVIRONMENTAL QUALITY

GENERALLY

The issuance of a special recreation use permit for the 1986 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

Inyo Audubon Society, Citizens for Mojave National Park, 91 IBLA 199 (Apr. 15, 1986)

ENVIRONMENTAL STATEMENTS

In deciding whether to grant a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, which is planned as part of a larger project involving the treatment and exporting of that wastewater for agricultural reuse after storage, which project is subject to funding or authorization by other federal agencies, BLM is only responsible for assessing the environmental impact of the right-of-way grant.

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to mitigate any significant environmental impact, the Board will, rather than set aside the grant, remand the case to BLM for inclusion of appropriate stipulations.

Sierra Club, Inc., et al., 92 IBLA 290 (June 26, 1986)

ESTOPPEL

The Department does not have an affirmative duty to immediately adjudicate a mining claimant's recordation filings made pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

ESTOPPEL--Continued

Estoppel will not lie against the United States where there is no evidence of affirmative misrepresentation or concealment of material fact by the Government.

R. K. Killion, 90 IBLA 178 (Feb. 27, 1986)

The Board of Land Appeals has well established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co.; the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

Pierpigas Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

Where an oil and gas operator obtains oral permission to do preliminary work at a drilling site for which an application for permit to drill is pending, and then begins drilling without written permission to do so in violation of Departmental regulations, there is no factual basis for finding an estoppel of the Government which would prevent assessment of a penalty for unauthorized drilling operations.

William Perlman, 91 IBLA 288 (Apr. 2, 1986)
93 I.D. 159

The fact that a mining claimant has held a claim for many years in good faith and performed work on the claim is not determinative of the existence of a discovery.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 245 (Apr. 8, 1986)

EVIDENCE

BURDEN OF PROOF

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 245 (Apr. 8, 1986)

A party challenging the factual basis for a written incident of noncompliance bears the burden of establishing by a preponderance of the evidence that conditions were not as stated on the face of the document.

Yates Petroleum Corp., 91 IBLA 252 (Apr. 8, 1986)

CREDIBILITY

Where an application to acquire Federal land is rejected by BLM because applicant's declaration of material facts in the application demonstrates conclusively that he is not entitled to the land as a matter of law, a subsequent effort on appeal to revise

EVIDENCE--Continued

CREDIBILITY--Continued

owned, or deny the facts will not be considered, absent a persuasive explanation of error in the application.

Lorna Belle Hogan, 91 IBLA 343 (Apr. 21, 1986)

PRESUMPTIONS

Where the record does not indicate receipt of a document purportedly sent, a legal, but rebuttable, presumption exists that administrative officials did not receive the document.

Yates Petroleum Corp., 91 IBLA 252 (Apr. 9, 1986)

EXCHANGES OF LAND

GENERALLY

Under certain circumstances a document styled as a protest is properly treated as an appeal. Thus, where prior to completion of a private exchange by BLM, the owner of the mineral interest in the private land involved therein requests that BLM acquire its interest and BLM proceeds to complete the exchange and subsequently deny the request, a protest filed by the owner should be treated by BLM as an appeal of its denial and the case file forwarded to the Board of Land Appeals.

A surface-only private exchange undertaken pursuant to sec. 11 of the Relocation Act, 25 U.S.C. § 640d-10(a)(1) (1982), over the objection of the owner of the mineral interest in the private land involved in the exchange does not violate that Act. The Act imposes no legal requirement on the Secretary of the Interior to acquire such interest

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 640d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchanges, the opportunity to comment, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

A BLM decision to proceed with a proposed land exchange of public land containing wetlands and situated within a floodplain pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), as consistent with the public interest, will be vacated and remanded where the record shows that BLM did not consider including in the deed of conveyance a requirement to preserve the beneficial values of the floodplain consistent with Executive Order No. 11988 and BLM floodplain guidelines.

Mendibourn Ranches, Inc., et al., 90 IBLA 360 (Feb. 27, 1986)

FEDERAL EMPLOYEES AND OFFICIALS

AUTHORITY TO BIND GOVERNMENT

Reliance on erroneous information provided by a BLM employee cannot relieve the owner of an unpatented mining claim of an obligation imposed by statute, create rights not authorized by law, or relieve the claimant of the consequences imposed by the statute for failure to comply with its requirements

Thurman Oil & Mining Co., 90 IBLA 382 (Feb. 26, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

GENERALLY

The purposes of applying FLPMA's filing provisions to claims located before the Act was passed--to rid Federal lands of stale mining claims and to provide for centralized collection by Federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims--are clearly legitimate and, therefore, application of these provisions to claims located prior to FLPMA is permissible

Thurman Oil & Mining Co., 90 IBLA 382 (Feb. 26, 1986)

CALIFORNIA DESERT CONSERVATION AREA

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place Where the record does not support the opening because of the potential for unnecessary degradation of cultural resources, the decision will be reversed.

Wilderness Society et al., 90 IBLA 221 (Jan. 31, 1986)

The issuance of a special recreation use permit for the 1986 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS

Yuma Audubon Society, Citizens for Mojave National Park, 91 IBLA 309 (Apr. 15, 1986)

CORRECTION OF CONVEYANCE DOCUMENTS

Where one holding a patent from the United States applies to have the patent corrected to eliminate a reservation in accordance with sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), alleging that the purpose for the reservation no longer exists, the application is properly rejected where the record shows the reservation was not erroneously included in the patent on the basis of a mistake of fact

Bill G. Minton, Marylee Minton, 91 IBLA 198 (Mar. 14, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

DISCLAIMER OF INTEREST

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert H. Lesher et al., 90 IBLA 291 (Feb. 20, 1986)
93 I.D. 66

EXCHANGES

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 6004-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 6004-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 10 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 6004-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchanges, the opportunity to comment, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 208 (Jan. 30, 1986)

A BLM decision to proceed with a proposed land exchange of public land containing wetlands and situated within a floodplain pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), as consistent with the public interest, will be vacated and remanded where the record shows that BLM did not consider including in the deed of conveyance a requirement to preserve the beneficial values of the floodplain consistent with Executive Order No. 11988 and BLM floodplain guidelines.

Vandiboncoeur Ranches, Inc., et al., 90 IBLA 360 (Feb. 27, 1986)

LAND USE PLANNING

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the opening because of the potential

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LAND USE PLANNING--Continued

for unnecessary degradation of cultural resources, the decision will be reversed.

Wilderness Society et al., 90 IBLA 321 (Jan. 30, 1986)

PERMITS

The issuance of a special recreation use permit for the 1984 version of the Parker to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

Inyo Audubon Society, Citizens for Mojave National Park, 91 IBLA 389 (Apr. 15, 1986)

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM

Issuance of a patent to a state without mineral reservation removes the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Alaska Mining Corp., 90 IBLA 179 (Jan. 27, 1986)

Failure by mining claimants to timely record the location notice of a placer claim located prior to 1976 resulted in the invalidation of their placer claim pursuant to provision of sec. 314 of the Federal Land Policy and Management Act of 1976. The filing of assessment affidavits for invalid lode claims located over the placer claim could not operate to avoid the filing requirements of the Act.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

Instruments required to be filed with BLM by 43 U.S.C. § 1744(a) (1982), must identify the claim or claims for which they are filed by giving the correct claim name, the correct BLM assigned claim number, or a description of each claim sufficient to locate it on the ground.

Arley Taylor, 90 IBLA 313 (Feb. 25, 1986)

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), where the owner fails to timely file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 30 of the calendar year following the first filing of such evidence or notice.

Thurman Oil & Mining Co., 90 IBLA 342 (Feb. 26, 1986)

Failure to file affidavits of assessment work prior to Dec. 31 as required by 43 U.S.C. § 1744(a) (1982), constitutes abandonment of the claims and they may be declared void by BLM.

An owner of a millsite must be given notice of a filing deficiency and an opportunity to make corrections before the site may be deemed void for failure

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

to comply with the requirement of 43 U.S.C. § 1744(a) (1982).

Magnason Co., Inc., 91 IBLA 111 (Mar. 17, 1986)

RECORDATION OF MINING CLAIMS AND ABANDONMENT

The Department does not have an affirmative duty to immediately adjudicate a mining claimant's recordation filings made pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976.

Paul Vaillant et al., 90 IBLA 289 (Jan. 30, 1986)

The statutes and regulations governing the description of a mining claim given in a location certificate filed for recordation with BLM do not require that the locator submit information sufficiently accurate for BLM to determine the precise position of the claim on a township plat. Rather, the proper test is whether the claim may, in fact, be found and identified on the ground by following the information in the recorded description.

Acley Taylor, 90 IBLA 313 (Feb. 25, 1986)

The purposes of applying FLPMA's filing provisions to claims located before the Act was passed--to rid Federal lands of stale mining claims and to provide for centralized collection by Federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims--are clearly legitimate and, therefore, application of these provisions to claims located prior to FLPMA is permissible.

The text of FLPMA itself provides a mining claimant with effective notice of the annual filing requirements. Individualized notices of filing deadlines are not required by the Constitution.

Thurman Oil & Mining Co., 90 IBLA 362 (Feb. 26, 1986)

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

John J. May, 91 IBLA 191 (Mar. 28, 1986)

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the copy of the notice of location of the claim was received by BLM 1 day after the deadline for filing, pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), even though claimant mailed the document prior to the deadline.

Idaho Mining & Development Co., 92 IBLA 223 (June 23, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

It was error for BLM to reject the recordation of a mining claim, tendered in 1976, upon the subsequent (1983) tentative approval of the lands described therein. Although sec. 906(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c) (1982), caused all right, title, and interest to the lands to be vested in the State of Alaska upon tentative approval, subject to valid existing rights, that vesting followed the tender of recordation and will not sanction rejection of the tender. Upon the vesting of all right, title, and interest in the State, BLM could no longer adjudicate the validity of a claim located on such lands.

Ignatz A. Kaser, Harold T. McNally, 92 IBLA 229 (June 24, 1986)

When a single claim has been recorded with BLM pursuant to 43 U.S.C. § 1744 (1982) on more than one occasion and more than one mining recordation serial number has been assigned to the claim, the proper corrective procedure is to merge the respective files if, on a combined basis, all requisite filings have been made, the claim should not be declared abandoned and void for failure to comply with 43 U.S.C. § 1744(b) (1982).

Michael E. Elvas, 92 IBLA 327 (June 17, 1986)

RIGHTS-OF-WAY

BLM properly requires the municipal holder of a right-of-way for a water treatment plant to pay fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

"Municipal utility." A municipal utility is a political subdivision or agency of a political subdivision which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service.

City of Redding, 91 IBLA 92 (Mar. 11, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), authorizes the Secretary of the Interior to charge less than fair market value for right-of-way rental. However, a for profit business whose principal source of revenue results from subleasing communication facilities is not entitled to a reduction or waiver of a rental fee based on fair market value merely by providing a service to Government agencies or representatives of Government agencies.

Jim Doering, 91 IBLA 171 (Mar. 20, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management to prohibit wind energy development within the Table Mountain Area of Critical Environmental Concern will be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest. An application for a right-of-way for a wind energy project will be rejected where lands described therein are not available for development.

Kenneth W. Bowler, Westwind Electric, Inc., 91 IBLA 172 (Mar. 28, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a showing of error that the appraisal methods used by BLM are incorrect, an appraisal may be rebutted only by another appraisal.

Horizon Communications, 91 IBLA 399 (Apr. 30, 1986)

In deciding whether to grant a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, which is planned as part of a larger project involving the treatment and exporting of that wastewater for agricultural reuse after storage, which project is subject to funding or authorization by other Federal agencies, BLM is only responsible for assessing the environmental impact of the right-of-way grant.

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to mitigate any significant environmental impact, the Board will, rather than set aside the grant, remand the case to BLM for inclusion of appropriate stipulations.

Sierra Club, Inc., et al., 92 IBLA 290 (June 26, 1986)

WILDERNESS

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the opening because of the potential for unnecessary degradation of cultural resources, the decision will be reversed.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

The intent of the regulations limiting standing to appeal to a party to the case is to afford a rational framework for administrative decisionmaking on the assumption that the initial decisionmaker will have had the benefit of the input of such a party in reaching its decision. Where a party has actively participated in the consideration of an inventory unit for eligibility as a wilderness study area has requested in writing the opportunity to comment on applications for permit to drill (APD's) filed for lands within the unit, and has been recognized by the Bureau of Land Management as a party wishing to have input in the process of adjudicating APD's filed for lands within the unit, it is entitled to notice of the filing of those APD's, and it will be recognized as a party to the case on appeal of decisions granting APD's within the unit.

Utah Wilderness Ass'n, 91 IBLA 128 (Mar. 10, 1986)

Where oil and gas leases issued after enactment of the Federal Land Policy and Management Act of 1976, are located within a wilderness study area, are subject to the wilderness protection stipulation prohibiting impairment of wilderness suitability and are denied applications for permit to drill for failure to meet the nonimpairment standard, the denial itself is not a restriction which is tantamount to a suspension under 30 U.S.C. § 209 (1982).

Amoco Production Co. et al., 92 IBLA 337 (June 30, 1986)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

GENERALLY

The regulation at 30 CFR 243.2 provides that decisions regarding payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

Marathon Oil Co., 90 IBLA 236 (Jan. 30, 1986)
93 I.D. 6

RENTS

BLM properly requires the municipal holder of a right-of-way for a water treatment plant to pay fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

City of Redding, 91 IBLA 82 (Mar. 11, 1986)

FEES--Continued

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), authorizes the Secretary of the Interior to charge less than fair market value for right-of-way rental. However, a for profit business whose principal source of revenue results from subleasing communication facilities is not entitled to a reduction or waiver of a rental fee based on fair market value merely by providing a service to Government agencies or representatives of Government agencies.

Ila Doering, 91 IBLA 131 (Mar. 20, 1986)

FISH AND WILDLIFE SERVICE

Trespass cabins located within Yukedni National Wildlife Refuge are not eligible for continued private use, and special use permits for such use may not be issued pursuant to sec. 304 of the Alaska National Lands Conservation Act of 1980. The construction and occupancy of structures in trespass upon wilderness lands confer no rights which may be asserted against the United States.

Edd J. Perry, Richard E. King, Hansel E. Donoho, 6 OHA 113 (Jan. 7, 1986)

GRAZING AND GRAZING LANDS

Departmental regulation 43 CFR 4120.3-3 provides that a permittee or lessee may apply to BLM for permission to modify a range improvement permit issued pursuant to sec. 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315(m) (1982), and, under 43 CFR 4140.1 (b)(2), modification of a range improvement without BLM authorization is a prohibited act. Where, pursuant to a range improvement permit, a livestock operator constructs a stock-watering facility, including steel gates which, when closed, bar access to livestock and wild horses and the operator subsequently installs highway guardrails across the gate openings to discourage or prevent wild horses from gaining access to the watering facilities, while allowing entry to livestock, such installation constitutes a change in the purpose of the improvements originally approved and is a modification of the improvements authorized in the permit. As a result, the operator is required to seek authorization therefor prior to installation.

Where BLM requires a livestock operator to remove unauthorized modifications of corral gate openings which were installed to discourage or prevent wild horses from gaining access to watering facilities, while allowing entry to livestock, and the operator fails to do so, BLM may cancel the operator's range improvement permit for failure to obtain BLM's permission to modify the authorized improvements. However, where on appeal of that cancellation the record shows that the livestock operator is a sound range manager and that a serious problem with wild horses exists, the operator will be granted 15 days from receipt of the Board's decision in which to remove the unauthorized modification, failing in which the cancellation will become final.

Joe R. Pallini, Jr., et al. v. Bureau of Land Management, 92 IBLA 209 (June 19, 1986)

GRAZING PERMITS AND LICENSES

CANCELLATION OR REDUCTION

Where BLM requires a livestock operator to remove unauthorized modifications of corral gate openings which were installed to discourage or prevent wild horses from gaining access to watering facilities, while allowing entry to livestock, and the operator fails to do so, BLM may cancel the operator's range improvement permit for failure to obtain BLM's permission to modify the authorized improvements. However, where on appeal of that cancellation the record shows that the livestock operator is a sound range manager and that a serious problem with wild horses exists, the operator will be granted 15 days from receipt of the Board's decision in which to remove the unauthorized modification, failing in which the cancellation will become final.

Joe R. Pallini, Jr., et al. v. Bureau of Land Management, 92 IBLA 209 (June 19, 1986)

TRESPASS

Where the record supports the findings by an Administrative Law Judge that BLM conducted a roundup of trespassing animals in a reasonable manner, the costs imposed on the owners were reasonable, and such conduct and costs comport with the applicable regulations, the findings will not be modified on appeal.

John W. Thacker, Eugene Thacker v. Bureau of Land Management, 91 IBLA 356 (Apr. 23, 1986)

HEARINGS

In the absence of a dispute as to a material fact, the due process rights of an applicant for a Native allotment are satisfied by an appeal to the Board of Land Appeals.

Edward A. Nicholi, 90 IBLA 273 (Feb. 5, 1986)

A special use permit is subject to any special condition or stipulation mandated by Departmental policy and considered by the authorized officer issuing the permit as necessary for protection of public interests, including restrictions against transfer or assignment of permit privileges. Where there are disputed facts determinative of whether or not permit privileges were assigned to a third party, the matter may be referred for a hearing for introduction of testimony and other evidence.

Hondoo River & Trails, 91 IBLA 296 (Apr. 15, 1986)

Where lands described in a previously relinquished Native Allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native Allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

CONVEYANCE (PROPERTY)

General Construction

A transaction of oil and gas in lands patented under sec. 7 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a hydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert E. Lesher et al., 93 IBLA 293 (Feb. 20, 1986) 93 I.D. 66

INDIAN PROBATE

CHILDREN, ILLEGITIMATE (See also INHERITING--if included in this Index)

Generally

The failure of a man to acknowledge paternity of an illegitimate child to his family is not sufficient to prove he is not the father.

Estate of Paul Leon Monteth, 14 IBIA 123 (May 30, 1986)

HEARING (See also ADMINISTRATIVE PROCEDURE, HEARING--if included in this Index)

Generally

An individual who has been found to be an heir of an Indian decedent does not forfeit the right to participate in the estate by failing to attend a rehearing in which that heirship is not questioned.

Estate of Paul Leon Monteth, 14 IBIA 123 (May 30, 1986)

INVENTORY (See also MODIFICATION OF INVENTORY--if included in this Index)

Property Erroneously Excluded or Included

The inventory of a deceased Indian's trust or restricted property prepared by the Bureau of Indian Affairs for use in probating the decedent's Indian trust estate properly does not include lands that were deeded to another person during the decedent's lifetime.

Estate of Max Doot, 14 IBIA 129 (May 30, 1986)

STATE LAW

Applicability to Indian Probate Estate

The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law.

Estate of Winona June Little Hawk Garcia, 14 IBIA 196 (Apr. 8, 1986)

Pretermitted Heir

Under prior holdings of the Board of Indian Appeals, the decision in Tooahnippah v. Hickel, 397 U.S. 598 (1970), and in the absence of substantive probate regulations, the Department of the Interior

STATE LAW--Continued

Pretermitted Heir--Continued

lacks authority to disapprove an Indian will that does not provide for after-born children.

Estate of Winona June Little Hawk Garcia, 14 IBIA 196 (Apr. 8, 1986)

WILLS (See also CONTRACT TO MAKE WILL, INHERITING--if included in this Index)

Children, Disinheritance of

Under prior holdings of the Board of Indian Appeals, the decision in Tooahnippah v. Hickel, 397 U.S. 598 (1970), and in the absence of substantive probate regulations, the Department of the Interior lacks authority to disapprove an Indian will that does not provide for after-born children.

Estate of Winona June Little Hawk Garcia, 14 IBIA 196 (Apr. 8, 1986)

Construction of

The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law.

Estate of Winona June Little Hawk Garcia, 14 IBIA 196 (Apr. 8, 1986)

Disapproval of Will

Under prior holdings of the Board of Indian Appeals, the decision in Tooahnippah v. Hickel, 397 U.S. 598 (1970), and in the absence of substantive probate regulations, the Department of the Interior lacks authority to disapprove an Indian will that does not provide for after-born children.

Estate of Winona June Little Hawk Garcia, 14 IBIA 196 (Apr. 8, 1986)

INDIANS

GENERALLY

A surface-only private exchange undertaken pursuant to sec. 11 of the Relocation Act, 25 U.S.C. § 640d-10(a)(1) (1982), over the objection of the owner of the mineral interest in the private land involved in the exchange does not violate that Act. The Act imposes no legal requirement on the Secretary of the Interior to acquire such interest.

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 640d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchange, the opportunity

GENERALLY--Continued

to comment, and was not prejudiced by BIA's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 93 IBIA 288 (Jan. 30, 1986)

BLOOD QUANTUM

The Board of Indian Appeals has jurisdiction to review decisions by the Bureau of Indian Affairs concerning applications for certification of degree of Indian blood.

The procedures followed by the Bureau of Indian Affairs in determining an individual's Indian blood quantum are rules within the meaning of 5 U.S.C. § 551(4) (1982) and are required by 5 U.S.C. § 552 (1982) to be published in the Federal Register.

Under 5 U.S.C. § 552(a)(1) (1982) and the Supreme Court's holding in Morton v. Ruiz, 415 U.S. 199 (1974) an individual may not be adversely affected by a rule required to be published in the Federal Register that is not so published.

Morgan Whitewood, Sr. v. Deputy Asst. Secretary--Indian Affairs (Operations), 13 IBIA 9 (Jan. 31, 1986) 93 I.D. 13

CIVIL RIGHTS

Indian Civil Rights Act of 1968

Constitutional proscriptions, such as those contained in the Fifth and Fourteenth Amendments to the United States Constitution, that limit the exercise of Federal and state governmental powers, are not applicable to Indian tribes except to the extent they are explicitly endorsed by a tribal constitution or imposed by Congress.

The Board of Indian Appeals is not the proper forum in which to challenge a tribal ordinance as being violative of the guarantee of equal protection of the laws as provided in the Indian Civil Rights Act.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 13 IBIA 86 (Feb. 25, 1986) 93 I.D. 70

HUNTING, FISHING, AND GATHERING RIGHTS

Generally

The Board of Indian Appeals does not have authority to change a duly promulgated regulation of the Department or to declare it invalid.

The use of Columbia River in-lieu fishing sites for permanent residences or for the permanent storage of trailers and other personal property violates 25 CFR Part 249.

David Schappy, Sr., et al. v. Acting Deputy Asst. Secretary--Indian Affairs (Operations), 13 IBIA 109 (Apr. 4, 1986) 93 I.D. 176

LANDS

Generally

The inventory of a deceased Indian's trust or restricted property prepared by the Bureau of Indian Affairs for use in probating the decedent's Indian trust estate properly does not include lands that were deeded to another person during the decedent's lifetime.

Estate of Sam Poor, 13 IBIA 178 (May 23, 1986)

Allotments on Public Domain

Lands Subject to

Where a Paiute Indian files an Indian allotment application for land located in New Mexico, pursuant to sec. 9 of the Act of Dec. 22, 1970, 25 U.S.C. § 5809-8 (1982), which provides only for the allotment of certain land in Arizona to qualified Paiute Indians, the the application is properly rejected.

Claudine A. Hatch, 91 IBIA 83 (Mar. 18, 1986)

LAW AND ORDER

Tribal Constitutions, Bylaws, and Ordinances

Petitions for Secretarial action filed under 25 CFR Part 81 are limited to requests for the Secretary to call elections to amend tribal constitutions, to issue charters pursuant to a Federal statute, and for other purposes where constitutions and charters provide for petitioning to effect action by the Secretary.

An election called by the Secretary pursuant to 25 CFR Part 81 is not appropriate for the purposes of temporarily suspending a tribal constitution and recalling and replacing tribal officials.

Pueblo of Zuni Concerned Community Citizens Committee v. Acting Deputy Asst. Secretary--Indian Affairs (Operations), 13 IBIA 30 (Feb. 12, 1986)

LEASES AND PERMITS

Generally

Failure to obtain written approval prior to initial drilling, plug-back, or recompletion drilling operations violates provisions both of 25 CFR 211.29 and 30 CFR 221.21(b) (1982). Whether a penalty should be assessed under provision of 25 CFR 211.29 or 30 CFR 221 requires interpretation of both the regulatory scheme and the oil and gas lease affected. Departmental regulations implementing the Indian Mineral Leasing Act are found to have specific and primary application in cases involving Indian lands leased for oil and gas.

Where a lessee of Indian lands commences drilling operations without written approval, penalties assessed must be reasonably related to the nature of the prohibited conduct. Maximum penalties should not be imposed if mitigating circumstances are present. Pursuant to provision of 25 CFR 211.29, the amount of penalty to be imposed is committed to the sound exercise of agency discretion.

Determination of the proper amount to be assessed as a penalty for violation of the provisions of 25 CFR subpart 211 is committed to the sound discretion of the

agency and is governed by considerations of fairness applied to the individual facts of each violation.

William Perlich, 91 IBIA 288 (Apr. 2, 1986)
93 I.D. 159

Cancellation or Revocation

Where the terms of a lease of Indian trust land set forth specific revocation or cancellation procedures, such terms are binding on the parties and on the Bureau of Indian Affairs in its capacity as trustee.

Patrick Patencio et al. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 92 (Apr. 4, 1986)

Development Leases

When the administrative record does not contain the necessary factual basis for a determination of whether a long-term development lease of Indian trust land should be canceled, the matter will be referred for an evidentiary hearing and recommended decision.

Earle C. Hirebe v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 111 (May 21, 1986)

Violation/Breach

Generally

Where the terms of a lease of Indian trust land set forth specific revocation or cancellation procedures, such terms are binding on the parties and on the Bureau of Indian Affairs in its capacity as trustee.

Patrick Patencio et al. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 92 (Apr. 4, 1986)

MINERAL RESOURCES

Oil and Gas

Generally

Failure to obtain written approval prior to initial drilling, plug-back, or recompletion drilling operations violates provisions both of 25 CFR 211.20 and 30 CFR 221.21(b) (1982). Whether a penalty should be assessed under provision of 25 CFR 211.22 or 30 CFR 221 requires interpretation of both the regulatory scheme and the oil and gas lease affected. Departmental regulations implementing the Indian Mineral Leasing Act are found to have specific and primary application in cases involving Indian lands leased for oil and gas.

Where a lessee of Indian lands commences drilling operations without written approval, penalties assessed must be reasonably related to the nature of the prohibited conduct. Maximum penalties should not be imposed if mitigating circumstances are present. Pursuant to provision of 25 CFR 211.22, the amount of penalty to be imposed is committed to the sound exercise of agency discretion.

Determination of the proper amount to be assessed as a penalty for violation of the provisions of 25 CFR subpart 211 is committed to the sound discretion of the

agency and is governed by considerations of fairness applied to the individual facts of each violation.

William Perlich, 91 IBIA 288 (Apr. 2, 1986)
93 I.D. 159

TAXATION

Approval by the Bureau of Indian Affairs of a tax ordinance passed by an Indian tribe in the exercise of its tribal sovereignty does not constitute an agency rule within the meaning of 5 U.S.C. § 551(4) (1982).

A tax ordinance passed by an Indian tribe does not unduly burden interstate commerce if it applies to an activity with a substantial nexus with the tribe, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the tribe.

A taxpayer claiming immunity from an Indian tribal tax has the burden of proving entitlement to an exemption.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 86 (Feb. 25, 1986) 93 I.D. 79

TRIBAL GOVERNMENT

Elections

Petitions for Secretarial action filed under 25 CFR Part 82 are limited to requests for the Secretary to call elections to amend tribal constitutions, to issue charters pursuant to a Federal statute, and for other purposes where constitutions and charters provide for petitioning to effect action by the Secretary.

An election called by the Secretary pursuant to 25 CFR Part 81 is not appropriate for the purposes of temporarily suspending a tribal constitution and recalling and replacing tribal officials.

Pueblo of Zuni Concerned Community Citizens Committee v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 30 (Feb. 12, 1986)

TRIBAL POWERS

Generally

The Board of Indian Appeals has jurisdiction over decisions issued by Bureau of Indian Affairs officials under Chapter I of 25 CFR. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

Vance Gillette, Margaret S. Wilson, & Frank Talker v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 14 IBIA 71 (Feb. 26, 1986)

Tribal Sovereignty

Approval by the Bureau of Indian Affairs of a tax ordinance passed by an Indian tribe in the exercise of

its tribal sovereignty does not constitute an agency rule within the meaning of 5 U.S.C. § 551(8) (1982).

Constitutional proscriptions, such as those contained in the Fifth and Fourteenth Amendments to the United States Constitution, that limit the exercise of Federal and state governmental powers, are not applicable to Indian tribes except to the extent they are explicitly enforced by a tribal constitution or imposed by Congress.

The Board of Indian Appeals is not the proper forum in which to challenge a tribal ordinance as being violative of the guarantee of equal protection of the laws as provided in the Indian Civil Rights Act.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 93 I.D. 79
93 IBIA 86 (Feb. 25, 1986)

LACHES

The Department does not have an affirmative duty to immediately adjudicate a mining claimant's recordation filings made pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976.

Paul Vaillant et al., 90 IBLA 289 (Jan. 30, 1986)

Delay by BLM in declaring mining claims void for failure to file the documents required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), does not negate the Government's right to do so because the statute is self-executing.

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

MILLSITES

GENERALLY

An owner of a millsite must be given notice of a filing deficiency and an opportunity to make corrections before the site may be deemed void for failure to comply with the requirement of 43 U.S.C. § 1744(a) (1982).

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

MINERAL LANDS

MINERAL RESERVATION

Where BLM reports that land within a reclamation homestead entry is valuable for oil and gas, after satisfactory reclamation final proof has been filed, that report may not be relied upon as a basis for imposition of a mineral reservation unless the Government is prepared to assume the burden, prima facie, that the land is known to be of mineral character at the date of acceptance of final proof. Where BLM issues a decision requiring consent to such a reservation, but the mineral report states the Government will not assume the burden of proving the reservation is proper and the record is unclear whether reservation is proper, the decision will be set aside and the case

remanded for action in accordance with 43 CFR 2093.3-1(c)(2).

Felix Fontes, 90 IBLA 319 (Feb. 24, 1986)

Removal of rock for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1976), constitutes a trespass because such material was reserved to the United States by the Act.

Harney Rock & Paving Co., 91 IBLA 278 (Dec. 19, 1986)
93 I.D. 179

PROSPECTING PERMITS

If all the requirements for issuance of a prospecting permit, including those requirements found at 43 CFR Subpart 3568 are met, it is proper for BLM to issue a prospecting permit for lands within the Whiskeytown-Shasta-Trinity National Recreation Area.

Noyan Exploration, Inc., 91 IBLA 55 (Feb. 28, 1986)

In June 1981 a 2-year extension of a prospecting permit properly ran from the date of expiration of the primary term of the permit and a BLM decision purporting to extend the term beyond that 2-year period was improper. Thus, when a prospecting permit applicant filed an application for certain lands covered by the extension shortly after the expiration of the 2-year period, the land was available and that applicant established priority such that a subsequent application was properly rejected by BLM.

Crown Resource Corp., 91 IBLA 180 (Mar. 28, 1986)

MINERAL LEASING ACT

GENERALLY

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms. Terms and conditions which are mandated by statute and regulation or are necessary for proper administration of public lands must be included in a readjusted lease.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

Gulf Oil Corp., The Pittsburgh & Midway Coal Mining Co., 91 IBLA 93 (Mar. 17, 1986)

MINERAL LEASING ACT--Continued

LANDS SUBJECT TO

Lands situated within the boundaries of incorporated cities, towns, or villages are specifically excluded from oil and gas leasing by the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 (1982).

Daniel C. Kitchens, 92 IBLA 10 (May 6, 1986)

RENTALS

A petition to waive rentals and reduce production royalties required by a coal lease shall contain the information set forth at 43 CFR 3485.2. The authorized officer may either reject a petition not meeting the criteria set forth in the regulation or request additional data.

A lessee seeking the waiver, suspension, or reduction of rental or minimum royalty, or the reduction of production royalty must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms.

Mountain States Resources Corp., 92 IBLA 188 (June 12, 1986) 93 I.D. 239

ROYALTIES

A petition to waive rentals and reduce production royalties required by a coal lease shall contain the information set forth at 43 CFR 3485.2. The authorized officer may either reject a petition not meeting the criteria set forth in the regulation or request additional data.

A lessee seeking the waiver, suspension, or reduction of rental or minimum royalty, or the reduction of production royalty must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms.

Mountain States Resources Corp., 92 IBLA 188 (June 12, 1986) 93 I.D. 239

MINING CLAIMS

GENERALLY

Issuance of a patent to a state without mineral reservation removes the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Alaair Mining Corp., 89 IBLA 179 (Jan. 22, 1986)

A petition for deferment of assessment work may only be granted pursuant to 30 U.S.C. § 28h (1982) and 43 CFR 3852.1 where "legal impediments" exist which affect the right of a mining claimant to enter upon the claim. In the absence of an adverse administrative determination regarding the validity of a mining claim, where the notice of location indicates the claim was located prior to any segregation of the land by an application for withdrawal, denial of a petition for deferment will be affirmed where the record discloses

MINING CLAIMS--Continued

GENERALLY--Continued

appellant had access to the claim, notwithstanding a warning that any attempt to locate or relocate the claim after segregation would be treated as a trespass.

Lyra-Vega II Mining Assn., 91 IBLA 378 (Apr. 28, 1986)

ABANDONMENT

Failure to file affidavits of assessment work prior to Dec. 31 as required by 43 U.S.C. § 1744(a) (1982), constitutes abandonment of the claims and they may be declared void by BLM.

Delay by BLM in declaring mining claims void for failure to file the documents required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), does not negate the Government's right to do so because the statute is self-executing.

Pierpoint Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

John T. May, 91 IBLA 181 (Mar. 24, 1986)

ASSESSMENT WORK

A petition for deferment of assessment work may only be granted pursuant to 30 U.S.C. § 28h (1982) and 43 CFR 3852.1 where "legal impediments" exist which affect the right of a mining claimant to enter upon the claim. In the absence of an adverse administrative determination regarding the validity of a mining claim, where the notice of location indicates the claim was located prior to any segregation of the land by an application for withdrawal, denial of a petition for deferment will be affirmed where the record discloses appellant had access to the claim, notwithstanding a warning that any attempt to locate or relocate the claim after segregation would be treated as a trespass.

Lyra-Vega II Mining Assn., 91 IBLA 378 (Apr. 28, 1986)

COMMON VARIETIES OF MINERALS

Unique Property

A deposit of gravel suitable for roadbuilding will be considered a common variety of gravel under sec. 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1982), rather than a locatable mineral, where the record establishes the widespread availability of other deposits of gravel equally suitable for such purpose, notwithstanding the fact that the gravel deposit might be developed more economically because of the size and hardness of the gravel.

Sandstone will be considered a common variety of mineral under sec. 3 of the Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1982), where, although the red coloration of the stone may be unique, there is no evidence that because of the coloration the stone would command a higher price on the market.

United States v. Elmer G. Thomas et al., 90 IBLA 255 (Jan. 31, 1986)

CONTESTS

As a general rule, in a private contest the burden of proof is on the contestant to establish the invalidity of the contested claim or claims by a preponderance of the evidence. Where the contestant fails to do so as to all or parts of 16 of 52 contested bentonite claims, the contest is properly dismissed as to those 16 claims. The remaining claims are properly found to be invalid.

Ila O. Schlosser et al. v. Verle Pierce et al., 92 IBLA 188 (June 6, 1986) 93 I.D. 211

DETERMINATION OF VALIDITY

A deposit of gravel suitable for roadbuilding will be considered a common variety of gravel under sec. 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1982), rather than a locatable mineral, where the record establishes the widespread availability of other deposits of gravel equally suitable for such purpose, notwithstanding the fact that the gravel deposit might be developed more economically because of the size and hardness of the gravel.

Sandstone will be considered a common variety of mineral under sec. 3 of the Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1982), where, although the red coloration of the stone may be unique, there is no evidence that because of the coloration the stone would command a higher price on the market.

A mining claimant will be held not to have overcome the Government's prima facie case of the lack of discovery of a valuable deposit of bentonite where he has not rebutted evidence that the bentonite cannot be mined, removed and marketed at a profit. A mining claimant is not permitted to aggregate the returns obtainable from sale of a nonlocatable common variety of mineral removed as overburden with those which can be obtained from mining the locatable mineral in order to support a discovery.

United States v. Elmer G. Thomas et al., 90 IBLA 255 (Jan. 31, 1986)

The basic test for determining whether a mining claimant has discovered a valuable mineral deposit on his mining claim is the "prudent man rule." This rule, stated in Castle v. Womble, 19 L.D. 455 (1894), provides that in order for there to be a discovery, there must be exposed within the limits of the claim minerals of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The "prudent man rule" is complemented by the "marketability test." That is, in order to establish the existence of a valuable mineral deposit, it must be shown that the mineral can be extracted, removed, and marketed at a profit.

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 295 (Apr. 8, 1986)

DETERMINATION OF VALIDITY--Continued

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

George T. Frisk, 92 IBLA 181 (May 23, 1986)

A bentonite mining claimant is not required to show each claim he has located is capable of independently supporting a paying mine. Rather, marketability of a known bentonite clay deposit, a low-grade, high-volume clay material, may be demonstrated by showing the feasibility of mining several claims under a single operation where each claim is shown to contain sufficient mineralization to qualify for inclusion within the mined group.

Where the mineral character of land has been contested for lack of bentonite clay of sufficient quality and quantity, the locator of a bentonite placer mining claim must show the mineral character of each 10-acre tract within the claim. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. Where a preponderance of the evidence at hearing establishes an absence of bentonite from several 10-acre tracts claimed, those parts of the contested claims are properly declared invalid.

As a general rule, in a private contest the burden of proof is on the contestant to establish the invalidity of the contested claim or claims by a preponderance of the evidence. Where the contestant fails to do so as to all or parts of 16 of 52 contested bentonite claims, the contest is properly dismissed as to those 16 claims. The remaining claims are properly found to be invalid.

Ila O. Schlosser et al. v. Verle Pierce et al., 92 IBLA 188 (June 6, 1986) 93 I.D. 211

DISCOVERY

Generally

The basic test for determining whether a mining claimant has discovered a valuable mineral deposit on his mining claim is the "prudent man rule." This rule, stated in Castle v. Womble, 19 L.D. 455 (1894), provides that in order for there to be a discovery, there must be exposed within the limits of the claim minerals of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The "prudent man rule" is complemented by the "marketability test." That is, in order to establish the existence of a valuable mineral deposit, it must be shown that the mineral can be extracted, removed, and marketed at a profit.

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

Evidence of mineralization which may justify further exploration, but not development of a mine,

does not establish the discovery of a valuable mineral deposit.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 345 (Dec. 9, 1985)

A bentonite mining claimant is not required to show each claim he has located is capable of independently supporting a paying mine. Rather, marketability of a known bentonite clay deposit, a low-grade, high-volume clay material, may be demonstrated by showing the feasibility of mining several claims under a single operation where each claim is shown to contain sufficient mineralization to qualify for inclusion within the mined group.

Jim D. Schlosser et al. v. Vario Pierce et al., 92 IBLA 199 (June 6, 1986) 93 I.D. 211

Marketability

A mining claimant will be held not to have overcome the Government's prima facie case of the lack of discovery of a valuable deposit of bentonite where he has not rebutted evidence that the bentonite cannot be mined, removed and marketed at a profit. A mining claimant is not permitted to aggregate the returns obtainable from sale of a nonlocatable common variety of mineral removed as overburden with those which can be obtained from mining the locatable mineral in order to support a discovery.

United States v. Vlasr G. Thomas et al., 90 IBLA 255 (Jan. 31, 1986)

A bentonite mining claimant is not required to show each claim he has located is capable of independently supporting a paying mine. Rather, marketability of a known bentonite clay deposit, a low-grade, high-volume clay material, may be demonstrated by showing the feasibility of mining several claims under a single operation where each claim is shown to contain sufficient mineralization to qualify for inclusion within the mined group.

Jim D. Schlosser et al. v. Vario Pierce et al., 92 IBLA 199 (June 6, 1986) 93 I.D. 211

EXTRALATERAL RIGHTS

Mining claims wholly located on lands patented without a mineral reservation to the United States are properly declared null and void ab initio. However, a lode mining claim located partially on withdrawn or patented land is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

James W. Phillips, 92 IBLA 58 (May 13, 1986)

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Silberbach, 90 IBLA 317 (Feb. 25, 1986)

BLM properly declares a mining claim null and void ab initio where the land has been conveyed to the United States with a mineral reservation to the grantor or his predecessor in interest, even though the original conveyance from the United States was pursuant to sec. 3 of the Act of July 17, 1866, 14 Stat. 294 (1866), which expressly excluded mineral lands from the operation of the Act.

Gold-West Industries, Inc., 90 IBLA 372 (Feb. 27, 1986)

The fact that a mining claimant has held a claim for many years in good faith and performed work on the claim is not determinative of the existence of a discovery.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 345 (Dec. 9, 1985)

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(2) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(2) (1982), and utilized as a basis for declaring mining claims null and void ab initio, where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

Pursuant to 43 CFR 2653.9(d), the filing of a Native regional corporation selection under sec. 16 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), segregates the selected land from all other forms of appropriation under the public land laws, including the mining and mineral leasing laws. The segregative effect of such an application terminates upon final rejection of the application.

When it is not clear whether a regional corporation selection was made only under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1613 (1982) of that Act, a BLM decision declaring certain mining claims null and void ab initio because notation of the selection on the public land records had segregated the land from mining location may be set aside and the case remanded for a determination of the statutory basis for the selection.

Maurice E. DeBoer, 91 IBLA 217 (Apr. 15, 1986)

BLM may properly declare a mining claim null and void ab initio where it was located at a time when the land was withdrawn from mineral entry by Secretarial order of Dec. 19, 1908, issued pursuant to sec. 3 of the Reclamation Act of June 17, 1902, 32 Stat. 388.

James W. Bullard, Harold W. Bullard, 91 IBLA 391 (Apr. 29, 1986)

LANDS SUBJECT TO--Continued

Under 43 CFR 2091.4-8 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Merlin L. Strassburg, Wilford D. Strassburg, 92 IBLA 1 (Apr. 30, 1986)

Lands which were acquired under the Weeks Act for a national forest are not subject to location of mining claims under 30 U.S.C. § 22 (1982). Such "acquired lands" are properly distinguished from "public domain" or "public lands" withdrawn or reserved for national forest purposes which are subject to mineral entry under 16 U.S.C. §§ 478, 478 (1982).

Melvin Fraser, & Diane Golby, 92 IBLA 29 (May 6, 1986)

Mining claims wholly located on lands patented without a mineral reservation to the United States are properly declared null and void ab initio. However, a lode mining claim located partially on withdrawn or patented land is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

James W. Phillips, 92 IBLA 58 (May 13, 1986)

BLM may properly declare a mining claim null and void ab initio where it was located at a time when the land was segregated from mineral entry pursuant to 43 CFR 2627.4(b) by virtue of the filing of a state selection application, and there is no evidence that the claim is an amendment of a location which predates that filing.

Rodney D. Jackson, Vernon P. Griffin, 92 IBLA 87 (May 28, 1986)

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

George M. Kriet, 92 IBLA 101 (May 30, 1986)

When it is not clear whether a regional corporation selection was made under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1613 (1982) of that Act, the case may be remanded for a determination of the statutory basis for the selection.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1611 (1982), thereby rendering mining claims located thereafter null and void ab initio, where neither the Act nor the implementing regulations

LANDS SUBJECT TO--Continued

of the Department provide that the filing of such a selection application segregates the land from other appropriation.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613 (1982), thereby rendering mining claims located thereafter null and void ab initio, in the absence of a master title plat or other land use record entry depicting that the application was filed under that statutory authority.

Nancy Williamsworth, 92 IBLA 158 (June 13, 1986)

LOCATION

Where mining claimants filed lode claims over a placer location previously made by them on the same land for the same mineral, the lode claims cannot legally be treated as an amendment of the placer claim.

Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio.

Failure by mining claimants to timely record the location notice of a placer claim located prior to 1976 resulted in the invalidation of their placer claim pursuant to provision of sec. 314 of the Federal Land Policy and Management Act of 1976. The filing of assessment affidavits for invalid lode claims located over the placer claim could not operate to avoid the filing requirements of the Act.

Paul Vaillant et al., 92 IBLA 289 (Jan. 30, 1986)

The fact that a mining claimant has held a claim for many years in good faith and performed work on the claim is not determinative of the existence of a discovery.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 245 (Apr. 8, 1986)

LODE CLAIMS

Where mining claimants filed lode claims over a placer location previously made by them on the same land for the same mineral, the lode claims cannot legally be treated as an amendment of the placer claim.

Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio.

Paul Vaillant et al., 92 IBLA 289 (Jan. 30, 1986)

Mining claims wholly located on lands patented without a mineral reservation to the United States are properly declared null and void ab initio. However, a lode mining claim located partially on withdrawn or patented land is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

James W. Phillips, 92 IBLA 58 (May 13, 1986)

MINING CLAIMS--Continued

MINERAL LANDS

Where the mineral character of land has been contested for lack of bentonite clay of sufficient quality and quantity, the locator of a bentonite placer mining claim must show the mineral character of each 10-acre tract within the claim. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. Where a preponderance of the evidence at hearing establishes an absence of bentonite from several 10-acre tracts claimed, those parts of the contested claims are properly declared invalid.

Jim D. Schlosser et al. v. Verle Pierce et al., 90 IBLA 109 (June 6, 1986) 93 I.D. 211

PLACER CLAIMS

Where mining claimants filed lode claims over a placer location previously made by them on the same land for the same mineral, the lode claims cannot legally be treated as an abandonment of the placer claim.

Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio.

Failure by mining claimants to timely record the location notice of a placer claim located prior to 1976 resulted in the invalidation of their placer claim pursuant to provision of sec. 314 of the Federal Land Policy and Management Act of 1976. The filing of assessment affidavits for invalid lode claims located over the placer claim could not operate to avoid the filing requirements of the Act.

Paul Vaillant et al., 90 IBLA 299 (Jan. 30, 1986)

Where the mineral character of land has been contested for lack of bentonite clay of sufficient quality and quantity, the locator of a bentonite placer mining claim must show the mineral character of each 10-acre tract within the claim. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. Where a preponderance of the evidence at hearing establishes an absence of bentonite from several 10-acre tracts claimed, those parts of the contested claims are properly declared invalid.

Jim D. Schlosser et al. v. Verle Pierce et al., 90 IBLA 109 (June 6, 1986) 93 I.D. 211

RECORDATION

Issuance of a patent to a state without mineral reservation removes the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Blazer Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

MINING CLAIMS--Continued

RECORDATION--Continued

The statutes and regulations governing the description of a mining claim given in a location certificate filed for recordation with BLM do not require that the locator submit information sufficiently accurate for BLM to determine the precise position of the claim on a township plat. Rather, the proper test is whether the claim may, in fact, be found and identified on the ground by following the information in the recorded description.

Tyler Taylor, 90 IBLA 311 (Feb. 25, 1986)

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), where the owner fails to timely file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 30 of the calendar year following the first filing of such evidence or notice.

Thurman Oil & Mining Co., 90 IBLA 342 (Feb. 26, 1986)

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the copy of the notice of location of the claim was received by BLM 1 day after the deadline for filing, pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), even though claimant mailed the document prior to the deadline.

Idaho Mining & Development Co., 92 IBLA 223 (June 23, 1986)

It was error for BLM to reject the recordation of a mining claim, tendered in 1976, upon the subsequent (1982) tentative approval of the lands described therein. Although sec. 906(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c) (1982), caused all right, title, and interest to the lands to be vested in the State of Alaska upon tentative approval, subject to valid existing rights, that vesting followed the tender of recordation and will not sanction rejection of the tender. Upon the vesting of all right, title, and interest in the State, BLM could no longer adjudicate the validity of a claim located on such lands.

Jonnie A. Wacey, Harold F. Donelly, 92 IBLA 228 (June 24, 1986)

RELOCATION

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

PJ Bilderback, 90 IBLA 319 (Feb. 25, 1986)

WITHDRAWN LAND

Where land was withdrawn from location under the mining law and mining claimants subsequently located

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

lode claims upon the same land, the lode claims were null and void ab initio

Paul Taillant et al., 88 IBLA 240 (Jan. 30, 1986)

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Billerbeck, 90 IBLA 319 (Feb. 25, 1986)

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), and utilized as a basis for declaring mining claims null and void ab initio, where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

Maurice W. DeBoer, 91 IBLA 317 (Apr. 15, 1986)

BLM may properly declare a mining claim null and void ab initio where it was located at a time when the land was withdrawn from mineral entry by Secretarial order of Dec. 18, 1908, issued pursuant to sec. 3 of the Reclamation Act of June 17, 1902, 32 Stat. 388.

James W. Bullard, Harold W. Bullard, 91 IBLA 391 (Apr. 22, 1986)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Merlin L. Strassburg, Wilford D. Strassburg, 92 IBLA 1 (Apr. 30, 1986)

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio

George M. Krier, 92 IBLA 101 (May 30, 1986)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

GENERALLY

The issuance of a special recreation use permit for the 1986 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

GENERALLY--Continued

environmental impacts of those aspects of the race which differ from those considered in the EIS

Vega Saludor Society, Citizens for Mojave National Park, 91 IBLA 180 (Apr. 15, 1986)

Where an environmental assessment fails to consider a clearly relevant alternative to a proposal to clearcut timber, a decision rejecting a protest of the proposed sale must be set aside and the case file remanded for supplementation of the EA to consider the alternative which it failed to study

State of Wyoming (Game & Fish Comm'n), 91 IBLA 364 (Apr. 28, 1986)

NAVIGABLE WATERS

Federal law must be applied by BLM to determine whether a lake is navigable in fact when determining ownership of a lakebed for purposes of issuance of a Federal oil and gas lease. In such a case, navigability depends upon whether there is evidence to show the lake had been used or was susceptible of being used as a highway for commerce at the time Statehood was conferred in 1889. An offer by the state to prove the lake was used as a waterway for commercial logging raises a sufficient issue of fact to require a fact-finding hearing to determine navigability of the lake at statehood

State of Montana, 91 IBLA 104 (Mar. 18, 1986)

NOTICE

GENERALLY

BLM is obligated to notify only the lessee of record about the termination of an oil and gas lease. If the lessee has created an interest in any other person by agreement, the prospective assignee must look to the lessee to provide notice of the termination

James Darby, 92 IBLA 231 (June 25, 1986)

CONSTRUCTIVE NOTICE

Where an authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication, that person will be deemed to have received the communication if it was delivered to his last address of record on file in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. 43 CFR 1810.2.

Lawrence P. Welsh, Jr., 91 IBLA 329 (Apr. 17, 1986)

A document sent certified mail by BLM to a person at his last address of record is considered to have been constructively served on that person at the time of return by the Postal Service of the undelivered certified letter, and such constructive service is equivalent in legal effect to actual service of the document. An oil and gas lessee's last address of record is that stated on the lease application form, unless the lessee has filed written notice of a change of address with the issuing BLM office. Thus, the time for filing a petition for reinstatement of a terminated oil and gas lease begins on the date the notice of

NOTICE--Continued

Communication NOTICE--Continued

termination was returned to BLM as undeliverable after it was sent to the lessee's last address of record, and expired 60 days later.

James Darby, 92 IBLA 231 (June 25, 1986)

OIL AND GAS LEASES

GENERALLY

The Secretary of the Interior has the discretionary authority to require the execution of special stipulations as a condition precedent to issuance of oil and gas leases for land which is located in a National Forest in order to protect environmental and other land use values. In the exercise of that authority BLM may establish a reasonable time limit of 30 days from receipt of notice for an over-the-counter lease offeror to submit a signed lease with the required stipulations. Where the offeror does not object to the stipulations, and files them with BLM in advance of a decision rejecting the offer but after the 30-day period allowed for filing, BLM should consider whether the late filing ought not be accepted under the provisions of 43 CFR 1821.2-2(d).

Bill Mathis et al., 90 IBLA 363 (Feb. 26, 1986)

An assessment levied pursuant to 43 CFR 3163.3 as a result of an incident of noncompliance with an applicable regulation, lease term, or written order is not a penalty or fine. Rather, it is in the nature of liquidated damages to cover loss or damage incurred by the lessor as a result of the specified incident of noncompliance. An assessment levied on the basis of a successive per-day amount may be reduced to a one-time charge to reflect a change in 43 CFR 3163.3.

A party challenging the factual basis for a written incident of noncompliance bears the burden of establishing by a preponderance of the evidence that conditions were not as stated on the face of the document.

An oil and gas lease operator has not complied with 43 CFR 3162.7(b)(6), requiring a storage area to be properly identified, if the identification sign does not bear the lease number. A sign affixed to a nearby operating well in accordance with 43 CFR 3162.6 does not satisfy 43 CFR 3162.7(b)(6).

An incident of noncompliance for failure to timely reclaim a working pit pursuant to a written order from BLM has not occurred where the Application for Permit to Drill states the pit is to be allowed to "dry out" before reclamation and evidence indicates the pit was saturated with fluids when the notice of an incident of noncompliance was issued.

Where evidence is presented by the appellant to overcome the presumption that the facts are correctly stated on a notice of an incident of noncompliance for operations conducted under an oil and gas lease and the record does not sufficiently support BLM's determination to issue the notice, the determination will be set aside.

Under the regulations in 43 CFR Subpart 3162 (Requirements for Lessees and Operators), an oil and gas lease operator is responsible for the submission of reports on the quantity of gas or oil produced.

Yates Petroleum Corp., 91 IBLA 252 (Apr. 7, 1986)

OIL AND GAS LEASES--Continued

OPERATIONS--Continued

BLM may properly determine the failure to submit timely a monthly report of operations is an incident of noncompliance under 43 CFR 3162.4-1.

Taylor/Hawks, Inc., 92 IBLA 199 (June 17, 1986)

Failure of the high bidder at a competitive oil and gas lease sale to execute a lease, tender the balance of the bonus bid, and pay the first year's lease rental within 10 days of notice to do so, results in forfeiture of the deposit submitted with the high bid. Refund of the deposit because offeror elects after the sale to withdraw his offer is not allowed.

D. R. Allison, D. R. Allison, 92 IBLA 197 (June 12, 1986)

ACQUIRED LANDS LEASES

Pursuant to 43 CFR 3110.1-3(b), the land in a noncompetitive oil and gas lease offer may not exceed 6 miles square except when the lease offer is for unsurveyed acquired land described by acquisition tract number and less than 50 percent of the tract lies outside the 6-mile square area. More than one tract may be included in the lease offer; however, less than 50 percent of only one tract in the offer may extend outside the 6-mile square area.

Excelsior Exploration Corp., 91 IBLA 76 (Mar. 3, 1986)

BLM must reject a noncompetitive oil and gas lease offer for acquired lands pursuant to 43 CFR 3112.5-2(b) where the land sought to be leased is determined to be within a known geologic structure after a simultaneous oil and gas lease drawing but prior to lease issuance. In such circumstances, the offeror is not entitled to a refund of the filing fee submitted with her lease application or interest on the first year's advance rental submitted with her lease offer.

Evelyn D. Buchstuhl, 91 IBLA 388 (Apr. 28, 1986)

APPLICATIONS

Generally

After a simultaneous oil and gas lease drawing the failure of a first-drawn applicant to file an offer in accordance with 43 CFR 3112.4-1 necessitates rejection of the offer. Where the offer form has been signed by one who is designated as an attorney-in-fact for the offeror, either a copy of the document granting the power of attorney must be submitted or a reference must be made to a qualifications file where such authorization has previously been filed, together with a statement the power of attorney is still valid, over the personal handwritten signature, in ink, of the prospective lessee.

Sabine Corp., 90 IBLA 327 (Feb. 28, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

R. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

APPLICATIONS--Continued

Generally--Continued

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Thunderbird Oil Corp., 91 IBLA 105 (Mar. 31, 1986)

Where amended regulations define any person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which provides an applicant with parcel recommendations in the form of parcel numbers only has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-8.

Angelo J. Spagnolo, 91 IBLA 265 (Apr. 9, 1986)

Department regulations define a person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications. When the record indicates a third party did nothing more than provide an applicant with parcel recommendations, that party has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-8.

Bruce W. Yoshiwara, 91 IBLA 273 (Apr. 11, 1986)

Where a first-drawn applicant for an oil and gas lease in the simultaneous leasing program fails to submit signed lease offers within 30 days of notice by BLM, the application is properly rejected.

Lawrence P. Welsh, Jr., 91 IBLA 330 (Apr. 17, 1986)

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a Secretarial order, and during the interim the lands in that parcel were designated as within the known geologic structure of a producing oil or gas field, the offer was properly rejected.

Robert Semanko, 91 IBLA 388 (Apr. 22, 1986)

The drawing of an oil and gas lease applicant's name as a first-priority applicant in a simultaneous oil and gas lease drawing does not create any property or contract right, but merely establishes the priority for filing a lease offer. The offer is not accepted until the lease form is signed by the Bureau of Land Management.

Gladys Walts, 91 IBLA 352 (Apr. 23, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Vincent Kuttner, 92 IBLA 67 (May 22, 1986)

Attorney-in-Fact or Agent

After a simultaneous oil and gas lease drawing the failure of a first-drawn applicant to file an offer in accordance with 43 CFR 3112.6-1 necessitates rejection of the offer. Where the offer form has been signed by one who is designated as an attorney-in-fact for the offeror, either a copy of the document granting the power of attorney must be submitted or a reference must be made to a qualifications file where such authorization has previously been filed, together with a statement the power of attorney is still valid, over the personal handwritten signature, in ink, of the prospective lessee.

Sabine Corp., 90 IBLA 327 (Feb. 26, 1986)

Drawings

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

S. E. Willis, 90 IBLA 378 (Feb. 27, 1986)

The Secretary has broad discretion to frame net se rules in administering the simultaneous oil and gas leasing program. Thus, an application that violates 43 CFR 3112.2-8 by failing to disclose any party or filing service which is in the business of providing assistance to participants in the program is properly rejected for violation of the regulation alone.

William Tepper (On Reconsideration), 91 IBLA 191 (Mar. 31, 1986)

BLM may properly reject a simultaneous oil and gas lease application filed on behalf of a partnership if the applicant has not complied with the provisions of 43 CFR 3112.2-3 by disclosing the identity of all partners on the application or on a sheet accompanying the application, a substantive requirement of the oil and gas leasing program.

ETA Oil Producers, 91 IBLA 268 (Apr. 11, 1986)

Department regulations define a person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications. When the record indicates a third party did nothing more than provide an applicant with parcel recommendations, that party has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-8.

Bruce W. Yoshiwara, 91 IBLA 273 (Apr. 11, 1986)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

A decision rejecting a simultaneous oil and gas lease drawing application bearing the holographic signature of the applicant on the basis that it has been executed in pencil rather than pen will be reversed on the ground that it is a nonsubstantive error

Jack Williams, 91 IBLA 335 (Apr. 21, 1986) 93 I.D. 18

BLM may properly declare simultaneous oil and gas lease applications unacceptable and return the filing fees and first year's rentals, minus a $75 processing fee for each Part B application form, where the applicant failed to submit separate remittances, in payment of the filing fees and first year's rentals with each Part B application

Eugene Greenaway, 91 IBLA 387 (Apr. 28, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field. The drawing of an application for a noncompetitive oil and gas lease creates no vested rights in the applicant; it only establishes the priority to be accorded conflicting applications

Vincent Wortham, 92 IBLA 67 (May 22, 1986)

Where amended regulations define any person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which merely provides an applicant with parcel recommendations in the form of parcel numbers has not "formulated" the application within the meaning of 43 CFR 3112.2-5 or 43 CFR 3112.0-5.

Joseph W. Crowley, 92 IBLA 75 (May 23, 1986)

BLM may properly declare simultaneous oil and gas lease applications unacceptable and return the filing fees and first year's rentals, minus a $75 processing fee for each Part B application form, where the applicants failed to submit separate remittances, in payment of the filing fees and first year's rentals with each Part B application.

Thomas F. Nancy Vicker, 92 IBLA 107 (May 30, 1986)

Filing

Where, following a drawing of simultaneously filed oil and gas lease applications, a first-drawn applicant fails to submit the executed lease agreement and advance rental within 30 days of receipt of notice to do so, the application is properly rejected.

Janet F. Largot, 91 IBLA 151 (Mar. 25, 1986)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Filing--Continued

Where amended regulations define any person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which provides an applicant with parcel recommendations in the form of parcel numbers only has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-8

Angelo L. Spatacino, 91 IBLA 265 (Apr. 9, 1986)

Departmental regulations define a person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications When the record indicates a third party did nothing more than provide an applicant with parcel recommendations, that party has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-8.

Bruce W. Yoshiwara, 91 IBLA 272 (Apr. 11, 1986)

A decision rejecting a simultaneous oil and gas lease drawing application bearing the holographic signature of the applicant on the basis that it has been executed in pencil rather than pen will be reversed on the ground that it is a nonsubstantive error.

Jack Williams, 91 IBLA 335 (Apr. 21, 1986) 93 I.D. 18

BLM must reject a noncompetitive oil and gas lease offer for acquired lands pursuant to 43 CFR 3112.5-2(b) where the land sought to be leased is determined to be within a known geologic structure after a simultaneous oil and gas lease drawing but prior to lease issuance. In such circumstances, the offeror is not entitled to a refund of the filing fee submitted with her lease application or interest on the first year's advance rental submitted with her lease offer.

Evelyn D. Puckstuhl, 91 IBLA 384 (Apr. 28, 1986)

BLM may not reject a simultaneous oil and gas lease application for failure to disclose the name of the entity which provided assistance to the applicant, pursuant to 43 CFR 3112.2-8, where the entity merely provided parcel recommendations and cannot be said to have "formulated" the application within the meaning of 43 CFR 3112.0-5.

Richard J. Lyons, 92 IBLA 58 (May 13, 1986)

Lawrence L. Krick, 92 IBLA 71 (May 22, 1986)

Where amended regulations define any person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which merely provides an applicant with parcel recommendations in the form of parcel numbers has not "formulated" the application within the meaning of 43 CFR 3112.2-5 or 43 CFR 3112.0-5.

Joseph W. Crowley, 92 IBLA 75 (May 23, 1986)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Six-mile Square Rule

Pursuant to 43 CFR 3110.1-3(b), the land in a noncompetitive oil and gas lease offer may not exceed 6 miles square except when the lease offer is for unsurveyed acquired land described by acquisition tract number and less than 50 percent of the tract lies outside the 6-mile square area. More than one tract may be included in the lease offer; however, less than 50 percent of only one tract in the offer may extend outside the 6-mile square area.

Circle K Exploration Corp., 91 IBLA 76 (Mar. 3, 1986)

BLM properly rejects a noncompetitive oil and gas lease offer which does not comply with the requirements of 43 CFR 3110.1-3(b) that lands in an offer be entirely within an area of 6-miles square or within an area not exceeding six surveyed sections in length or width measured in cardinal directions.

W.O.I.L. Associates, 92 IBLA 312 (June 26, 1986)

Sole Party in Interest

The failure to disclose an interest in a lease offer as required by 43 CFR 3102.7 (1978), as well as any other substantive violation of the regulations governing lease offers, renders an offer defective and precludes the person or entity applying from being a qualified applicant as required by 30 U.S.C. § 226 (1982). If a lease is issued pursuant to such an offer, it is voidable and subject to cancellation.

A filing service contract which includes a provision under which the filing service will sell its client's rights in oil and gas leases obtained by them is an agreement covering interests in oil and gas leases and itself constitutes an interest in oil and gas lease offers as defined at 43 CFR 3100.0-5(b) (1978).

A filing service contract which grants the filing service a percentage of the sales price and royalties due on any leases obtained by the client and sold by the filing service, gives the filing service a prospective or future claim to benefit from its client's leases and a right to share in the profits accrued from such leases as defined at 43 CFR 3100.0-5(b) (1978).

The regulatory definition of interests is not limited to the standard interests in oil and gas leases commonly recognized within the industry, but encompasses a broad range of methods of benefitting from a lease. It does not matter whether the benefit a filing service receives is enforceable against the lease itself, specific proceeds, or the client personally, or even if its claim could not ultimately be successfully enforced. Nor does it matter that it might not ultimately benefit because no lease is obtained, no buyer is found for a lease, or the lessee rejects all purchase offers.

Raymond C. Albrecht, Fred L. Engle d/b/a Resource Service Co., 92 IBLA 235 (June 25, 1986) 93 I.D. 258

ASSIGNMENTS OR TRANSFERS

Where the record titleholder of an oil and gas lease has made numerous assignments of interests in that lease, none of which has been approved by BLM, and the lease terminates by operation of law for failure to pay rental timely, only the record titleholder, and not any of the holders of unapproved assignments, may successfully petition for reinstatement of the lease pursuant to 30 U.S.C. § 188(c) or (d) (1982). The right to petition for reinstatement is personal to the record titleholder of the lease.

Howard B. Tibbon et al., 90 IBLA 288 (Feb. 10, 1986)

An oil and gas lease on which there is no well capable of production in paying quantities terminates automatically by operation of law where the annual rental is not paid on or before the lease anniversary date. Although an assignment of 100 percent of record title to a portion of the leased lands segregates the assigned portion and the retained portion into separate leases, this is not true of an assignment of operating rights and timely payment of the rental for the entire lease acreage is required to maintain the lease.

An assignment of operating rights in an oil and gas lease may not be approved after the lease has terminated for nonpayment of the annual rental and a decision dismissing a petition for reinstatement of the lease by the assignee of an unapproved assignment of operating rights will be affirmed.

Albert O. Flock, Carl J. Williams, Willie L. Sudalic, 91 IBLA 187 (Mar. 31, 1986)

A decision rejecting a request by an assignee for approval of a partial assignment of an oil and gas lease will be affirmed where the lease had terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date and the assignee had not tendered the rental required for the lands described in the partial assignment prior to the anniversary date.

Ruth L. Schworer, 92 IBLA 98 (May 28, 1986)

Where the record titleholder of an oil and gas lease fails to request reinstatement within 60 days of constructive service of a notice of termination of the lease, reinstatement is not authorized under governing statutory and regulatory provisions, and the termination of the lease becomes final. In these circumstances, BLM properly refuses to approve any pending assignments, as there is no lease interest left to be assigned.

BLM is obligated to notify only the lessee of record about the termination of an oil and gas lease. If the lessee has created an interest in any other person by agreement, the prospective assignee must look to the lessee to provide notice of the termination.

James Darby, 92 IBLA 231 (June 25, 1986)

CIVIL ASSESSMENTS AND PENALTIES

The Bureau of Land Management may properly issue a notice of an incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations for each calendar month, beginning with the month in which drilling operations were initiated.

An assessment for failure to file production reports in a timely manner pursuant to 43 CFR 3163.3(b) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied.

Sonset Oil Co., IBLA, 91 IBLA 137 (Mar. 28, 1986)

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

Where BLM issues notices of incidents of noncompliance to an oil and gas operator for failure to seal "appropriate valves" under 43 CFR 3162.7-8(a) and assesses the operator $250 per violation in accordance with 43 CFR 3163.3(j), and on appeal the operator establishes that, as applied to the operator's situation, the "appropriate valve" requirement is ambiguous, the violations and assessments will be overturned

Amadarko Production Co., 91 IBLA 154 (Mar. 25, 1986)

Failure to obtain written approval prior to initial drilling, plug-back, or recompletion drilling operations violates provisions both of 25 CFR 211.20 and 30 CFR 221.21(b) (1982). Whether a penalty should be assessed under provision of 25 CFR 211.22 or 30 CFR 221 requires interpretation of both the regulatory scheme and the oil and gas lease affected. Departmental regulations implementing the Indian Mineral Leasing Act are found to have specific and primary application in cases involving Indian lands leased for oil and gas

Where a lessee of Indian lands commences drilling operations without written approval, penalties assessed must be reasonably related to the nature of the prohibited conduct. Maximum penalties should not be imposed if mitigating circumstances are present. Pursuant to provision of 25 CFR 211.22, the amount of penalty to be imposed is committed to the sound exercise of agency discretion

Determination of the proper amount to be assessed as a penalty for violation of the provisions of 25 CFR subpart 211 is committed to the sound discretion of the agency and is governed by considerations of fairness applied to the individual facts of each violation.

Willian Perlman, 91 IBLA 208 (Apr. 2, 1986)
93 I.D. 159

Departmental regulation 43 CFR 3162.7-8(d)(1) (1984) required site facility diagrams to be filed within 30 days after new measurement facilities were installed or existing facilities were modified, and one who failed to file the required diagram was subject to a $100 assessment under 43 CFR 3163.3(h) (1984). However, an assessment for violating this provision will be reversed if an appellant establishes that installation of the equipment had not been completed more than 30 days prior to issuance of the notice of incident of noncompliance.

Vogel Resources Development Co., 91 IBLA 282 (Apr. 8, 1986)

An assessment levied pursuant to 43 CFR 3163.3 as a result of an incident of noncompliance with an applicable regulation, lease term, or written order is not a penalty or fine. Rather, it is in the nature of liquidated damages to cover loss or damage incurred by the lessor as a result of the specified incident of noncompliance. An assessment levied on the basis of a successive per-day amount may be reduced to a one-time charge to reflect a change in 43 CFR 3163.3

An assessment levied pursuant to 43 CFR 3163.3(a) is for failure to comply with a written order or instruction of the authorized officer within the time stated for abatement or compliance. An assessment may be levied where compliance with an order or instruction is not achieved within the specified period regardless of the apparent gravity of the impact of the noncompliance.

When an oil and gas lease operator has failed to report an oil spillage as required by 43 CFR

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

3162.5-1(c) and has failed to respond to BLM instructions to report the amount of oil spilled in the monthly report of operations as required by 3162.4-1, these separate actions may be treated as separate incidents of noncompliance.

An assessment for failure to file production reports in a timely manner pursuant to 43 CFR 3163.3(h) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied

Yates Petroleum Corp., 91 IBLA 252 (Apr. 9, 1986)

The Bureau of Land Management may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal a valve, as required by 43 CFR 3162.7-8(b)(1)

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(j) may be vacated by this Board, in view of the suspension of that regulation and the change in Department policy that such assessments should automatically be levied.

Lyco Energy Corp., 92 IBLA 81 (May 27, 1986)

BLM may properly assess liquidated damages pursuant to 43 CFR 3163.3(c) where an oil and gas lessee fails to obtain BLM approval of an application for a permit to drill prior to commencing drilling operations. Where, during BLM's technical and procedural review of an assessment order, 43 CFR 3163.3(c) is amended to reduce assessments to a one-time, rather than a continuing charge, the amended regulation will be applied to the benefit of the affected party, absent any intervening rights which will be affected or countervailing public policy reasons

Pearson-Mantin-Greer Drilling Corp., 92 IBLA 92 (May 28, 1986)

An assessment levied pursuant to 43 CFR 3163.3(h) for failure to file a monthly production report in a timely manner may be vacated by this Board, in view of the suspension of that regulation and a change in Department policy that such assessments should automatically be levied.

Burton/Hawks, Inc., 92 IBLA 180 (June 11, 1986)

A decision assessing liquidated damages pursuant to 43 CFR 3163.3(d) for an oil and gas lessee's failure to obtain approval before recompleting a well in a different interval will be reversed where the formation in which the well was recompleted has been determined by order of the state conservation commission to be part of a common pool embracing both the recompletion formation and the formation in which the well was initially completed.

Energy Reserves Group, Inc., 92 IBLA 218 (June 23, 1986)

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

Where there are disputed issues of fact which will be determinative of the legal issues presented, the Board has the authority, in its discretion, to order a hearing on the matter before an administrative law judge pursuant to 43 CFR 4.415.

E. B. Brooks, Jr., 92 IBLA 282 (June 25, 1986)

CONSOLIDATION AGREEMENTS

Where a producing unit agreement terminates after the conclusion of the primary term of the parent lease and part of the lands in the parent lease are simultaneously committed to a second producing unit, thereby effecting a segregation of the parent lease, the term of the nonunitized lease without production shall be for so long as oil or gas is produced in paying quantities upon the unitized lease, but not less than 2 years, and so long thereafter as oil or gas is produced in paying quantities on the nonunitized lease.

Conoco, Inc., 90 IBLA 388 (Feb. 28, 1986)

Mexpro Co., 90 IBLA 394 (Feb. 28, 1986)

COMPETITIVE LEASES

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale. A BLM decision rejecting a high bid as inadequate will be affirmed if appellant fails to overcome the Government's prima facie showing of correctness of its estimated minimum acceptable fair market value for the parcel and establish that appellant's bid reasonably reflects fair market value.

Suzanne Walsh, 91 IBLA 119 (Mar. 17, 1986)

The Bureau of Land Management may reject a bid in a competitive lease sale where the bid does not conform to the conditions set out in the lease sale notice. Where a minimum bid of $5 per acre was established by the advertised terms of sale, a bid for $1.39 was properly rejected.

John E. Rohrmann, 92 IBLA 68 (May 22, 1986)

Failure of the high bidder at a competitive oil and gas lease sale to execute a lease, tender the balance of the bonus bid, and pay the first year's lease rental within 30 days of notice to do so, results in forfeiture of the deposit submitted with the high bid. Refund of the deposit because offeror elects after the sale to withdraw his offer is not allowed.

D. E. Allsup, P. E. Allsup, 92 IBLA 197 (June 12, 1986)

The Board will affirm a BLM decision rejecting a high bid for a competitive oil and gas lease where the appellant fails to overcome, by a preponderance of the evidence, BLM's prima facie showing of the accuracy of its estimated fair market value for the offered parcel and where appellant fails to establish that its bid reasonably reflects fair market value.

Billy Krumbein, 92 IBLA 362 (June 30, 1986)

OIL AND GAS LEASES--Continued

DISCRETION TO LEASE

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale. A BLM decision rejecting a high bid as inadequate will be affirmed if appellant fails to overcome the Government's prima facie showing of correctness of its estimated minimum acceptable fair market value for the parcel and establish that appellant's bid reasonably reflects fair market value.

Suzanne Walsh, 91 IBLA 119 (Mar. 17, 1986)

The Board will affirm a BLM decision rejecting a high bid for a competitive oil and gas lease where the appellant fails to overcome, by a preponderance of the evidence, BLM's prima facie showing of the accuracy of its estimated fair market value for the offered parcel and where appellant fails to establish that its bid reasonably reflects fair market value.

Billy Krumbein, 92 IBLA 362 (June 30, 1986)

DRAINAGE

Where Geological Survey decides to deviate from straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of a unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986) 93 I.D. 95

EXTENSION

The granting of an application for suspension of an oil and gas lease rests in the discretion of the authorized officer. Where, however, the application for suspension does not contain the agreement of the lessee of record assenting to the request, the application does not comply with 43 CFR 3165, and may not be granted.

Unit agreements involving Federal oil and gas interests are effective as to those interests only upon the approval of the authorized officer. When a Federal lease in its extended term completes the term prior to approval of a unit agreement, that lease is not subject to extension under 43 CFR 3107.3-1 upon the subsequent approval of the unit agreement.

Tarlo Oil & Gas Co., 92 IBLA 86 (May 9, 1986)

EXTENSIONS

Where a producing unit agreement terminates after the conclusion of the primary term of the parent lease and part of the lands in the parent lease are simultaneously committed to a second producing unit, thereby effecting a segregation of the parent lease, the term of the nonunitized lease without production shall be for so long as oil or gas is produced in paying quantities upon the unitized lease, but not less than 2 years, and so long thereafter as oil or gas is produced in paying quantities on the nonunitized lease.

Conoco, Inc., 90 IBLA 388 (Feb. 28, 1986)

Mexpro Co., 90 IBLA 394 (Feb. 28, 1986)

Unit agreements involving Federal oil and gas interests are effective as to those interests only upon the approval of the authorized officer. When a Federal lease in its extended term completes the term prior to approval of a unit agreement, that lease is not subject to extension under 43 CFR 3107.1-1 upon the subsequent approval of the unit agreement.

Lario Oil & Gas Co., 92 IBLA 66 (May 9, 1986)

Where an oil and gas lease is in its extended term by reason of production at the time the lease is segregated by commitment in part to a unit agreement in accordance with 30 U.S.C. § 226(l) (1982), the segregated nonunitized lease will continue in effect by virtue of that production, but for not less than 2 years from the date of segregation.

Anadarko Production Co., 92 IBLA 212 (June 16, 1986) 93 I.D. 286

FIRST-QUALIFIED APPLICANT

The failure to disclose an interest in a lease offer as required by 43 CFR 3102.7 (1978), as well as any other substantive violation of the regulations governing lease offers, renders an offer defective and precludes the person or entity applying from being a qualified applicant as required by 30 U.S.C. § 226 (1982). If a lease is issued pursuant to such an offer, it is voidable and subject to cancellation.

Raymond G. Albrecht, Fred L. Eagle d/b/a Resource Service Co., 92 IBLA 235 (June 25, 1986) 93 I.D. 258

INCIDENTS OF NONCOMPLIANCE

The Bureau of Land Management may properly issue a notice of an incident of noncompliance with 43 CFR 3162.4-1, requiring the filing of a monthly report of operations for each calendar month, beginning with the month in which drilling operations were initiated.

Sohnut Oil Co., Inc., 91 IBLA 137 (Mar. 20, 1986)

Departmental regulation 43 CFR 3162.7-5(d) (1) (1988) required site facility diagrams to be filed within 30 days after new measurement facilities were installed or existing facilities were modified, and one who failed to file the required diagram was subject to a $100 assessment under 43 CFR 3163.1(b) (1988). However, an assessment for violating this provision will be reversed if an appellant establishes that installation of the equipment had not been completed more than 30 days prior to issuance of the notice of incident of noncompliance.

Fuel Resources Development Co., 91 IBLA 247 (Apr. 8, 1986)

A party challenging the factual basis for a written incident of noncompliance bears the burden of establishing by a preponderance of the evidence that conditions were not as stated on the face of the document.

An oil and gas lease operator has not complied with 43 CFR 3162.7(b)(6), requiring a storage area to be properly identified, if the identification sign does

not bear the lease number. A sign affixed to a nearby operating well in accordance with 43 CFR 3162.6 does not satisfy 43 CFR 3162.7(b)(6).

An incident of noncompliance for failure to timely reclaim a working pit pursuant to a written order from BLM has not occurred where the Application for Permit to Drill states the pit is to be allowed to "dry out" before reclamation and evidence indicates the pit was saturated with fluids when the notice of an incident of noncompliance was issued.

Where evidence is presented by the appellant to overcome the presumption that the facts are correctly stated on a notice of an incident of noncompliance for operations conducted under an oil and gas lease and the record does not sufficiently support BLM's determination to issue the notice, the determination will be set aside.

Yates Petroleum Corp., 91 IBLA 252 (Apr. 9, 1986)

KNOWN GEOLOGIC STRUCTURE

Pursuant to sec. 17(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected.

Charley D. Arney, 90 IBLA 378 (Feb. 27, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

R. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

BLM must reject a noncompetitive oil and gas lease offer to the extent it includes land determined after the filing of simultaneous oil and gas lease applications to be within a known geologic structure which, under 30 U.S.C. § 226(b) (1982), is subject to leasing only by competitive bidding.

John Rudd, 91 IBLA 162 (Mar. 25, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a secretarial order, and during the interim the lands in that parcel were designated as within the known geologic structure of a producing oil or gas field, the offer was properly rejected.

Robert Sepanko, 91 IBLA 348 (Apr. 22, 1986)

One who challenges a determination by the Bureau of Land Management that land is within the known geological structure of a producing oil or gas field has the burden of showing the determination is in error.

Gladys Kalta, 91 IBLA 352 (Apr. 23, 1986)

BLM must reject a noncompetitive oil and gas lease offer for acquired lands pursuant to 43 CFR 3112.5-2(b) where the land sought to be leased is determined to be within a known geologic structure after a simultaneous oil and gas lease drawing but prior to lease issuance. In such circumstances, the offeror is not entitled to a refund of the filing fee submitted with her lease application or interest on the first year's advance rental submitted with her lease offer.

Evelyn D. Ruckstuhl, 91 IBLA 388 (Apr. 28, 1986)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of $2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

A BLM determination that land leased for oil and gas is within a known geologic structure will not be overturned where the evidence establishes that the land is within a section transected by the 20-foot isopach of a productive formation and the lessee fails to present a preponderance of evidence to the contrary.

J. A. Masek dba Masek Oil Co., Barbara P. Sweeney, 92 IBLA 12 (May 6, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field. The drawing of an application for a noncompetitive oil and gas lease creates no vested rights in the applicant; it only establishes the priority to be accorded conflicting applications.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Vincent Wortman, 92 IBLA 67 (May 22, 1986)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert D. Lanier et al., 90 IBLA 283 (Feb. 25, 1986) 93 I.D. 69

Lands situated within the boundaries of incorporated cities, towns, or villages are specifically excluded from oil and gas leasing by the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 (1982).

Daniel C. Wychgram, 92 IBLA 10 (May 6, 1986)

Lands within a national park or withdrawn from oil and gas leasing by Public Land Order are not available for oil and gas leasing and BLM properly rejects a noncompetitive oil and gas lease offer for such lands.

Richard B. Clark, 92 IBLA 353 (June 20, 1986)

NONCOMPETITIVE LEASES

Pursuant to sec. 17(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected.

Charley D. Arney, 90 IBLA 375 (Feb. 27, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

R. K. Millican, 90 IBLA 378 (Feb. 27, 1986)

The Bureau of Land Management is not authorized to reject conditions imposed by the United States Forest Service upon acquired land managed by the Forest Service pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (1982). Where an oil and gas lessee objects to provisions of an apparent attempt by the Forest Service to condition the terms of his oil and gas lease on acquired land, agencies of the Department of the Interior may not adjudicate the validity of the challenged conditions.

James T. Chadney, 91 IBLA 182 (Mar. 28, 1986)

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

BLM must reject a noncompetitive oil and gas lease offer to the extent it includes land determined after the filing of simultaneous oil and gas lease applications to be within a known geologic structure which, under 30 U.S.C. § 226(b) (1982), is subject to leasing only by competitive bidding.

John Puddu, 91 IBLA 162 (Mar. 27, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a Secretarial order, and during the interim the lands in that parcel were designated as within the known geologic structure of a producing oil or gas field, the offer was properly rejected.

Robert Yamasato, 91 IBLA 388 (Apr. 22, 1986)

BLM must reject a noncompetitive oil and gas lease offer for acquired lands pursuant to 43 CFR 3112.5-2(b) where the land sought to be leased is determined to be within a known geologic structure after a simultaneous oil and gas lease drawing but prior to lease issuance. In such circumstances, the offeror is not entitled to a refund of the filing fee submitted with her lease application or interest on the first year's advance rental submitted with her lease offer.

Evelyn P. Buchstahl, 91 IBLA 388 (Apr. 28, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field. The drawing of an application for a noncompetitive oil and gas lease creates no vested rights in the applicant; it only establishes the priority to be accorded conflicting applications.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Vincent Mortano, 92 IBLA 67 (May 22, 1986)

OFFERS TO LEASE

The drawing of an oil and gas lease applicant's name as a first-priority applicant in a simultaneous oil and gas lease drawing does not create any property or contract right, but merely establishes the priority for filing a lease offer. The offer is not accepted until the lease form is signed by the Bureau of Land Management.

A noncompetitive lease offer must be rejected by the Bureau of Land Management wherever it is determined the land for which the offer is made is within a known geological structure.

Gladys Wells, 91 IBLA 382 (Apr. 23, 1986)

The failure to disclose an interest in a lease offer as required by 43 CFR 3102.7 (1979), as well as any other substantive violation of the regulations governing lease offers, renders an offer defective and precludes the person or entity applying from being a qualified applicant as required by 30 U.S.C. § 226 (1982). If a lease is issued pursuant to such an offer, it is voidable and subject to cancellation.

Raymond C. Albrecht, Fred L. Engle d/b/a Resource Service Co., 92 IBLA 215 (June 25, 1986) 93 I.D. 258

Lands within a national park or withdrawn from oil and gas leasing by Public Land Order are not available for oil and gas leasing and BLM properly rejects a noncompetitive oil and gas lease offer for such lands.

Richard H. Clark, 92 IBLA 353 (June 30, 1986)

REINSTATEMENT

Under 30 U.S.C. § 188(c) (1982), BLM lacks authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

Lucual Robert, 90 IBLA 182 (Jan. 23, 1986)

Where the record titleholder of an oil and gas lease has made numerous assignments of interests in that lease, none of which has been approved by BLM, and the lease terminates by operation of law for failure to pay rental timely, only the record titleholder, and not any of the holders of unapproved assignments, may successfully petition for reinstatement of the lease pursuant to 30 U.S.C. § 188(c) or (d) (1982). The right to petition for reinstatement is personal to the record titleholder of the lease.

Howard H. Vinson et al., 90 IBLA 289 (Feb. 19, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

BLM may properly condition class II reinstatement, under 30 U.S.C. §§ 188(d) and (e) (1982), of a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental upon tender of the required back rental, computed at the increased rate of $5 per acre set forth in 30 U.S.C. § 188(e)(2) (1982), within 60 days after receipt of a notice of termination.

Monica V. Rowland, 90 IBLA 380 (Feb. 26, 1986)

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Wayne J. Stanley, 90 IBLA 357 (Feb. 27, 1986)

An assignment of operating rights in an oil and gas lease may not be approved after the lease has terminated for nonpayment of the annual rental and a decision dismissing a petition for reinstatement of the lease by the assignee of an unapproved assignment of operating rights will be affirmed.

Albert R. Fleck, Carl J. Williams, William L. Medlin, 91 IBLA 187 (Mar. 11, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely unless the full amount of the rental due is submitted within 20 days after the anniversary date and other requirements are met.

Herbert J. Stinnett, Lois C. Stinnett, 91 IBLA 230 (Apr. 8, 1986)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a class I reinstatement of an oil and gas lease.

Reinstatement of a terminated noncompetitive oil and gas lease under sec. 371 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 188(d), (e) (1982), requires payment by the lessee of rental at the rate of $5 per acre as well as reimbursement of administrative costs (up to $500) and the cost of publishing notice in the Federal Register.

Oscar D. Graham, 91 IBLA 396 (Apr. 29, 1986)

A document sent certified mail by BLM to a person at his last address of record is considered to have been constructively served on that person at the time of return by the Postal Service of the undelivered certified letter, and such constructive service is equivalent in legal effect to actual service of the document. An oil and gas lessee's last address of record is that stated on the lease application form, unless the lessee has filed written notice of a change of address with the issuing BLM office. Thus, the time for filing a petition for reinstatement of a terminated oil and gas lease begins on the date the notice of termination was returned to BLM as undeliverable after

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

it was sent to the lessee's last address of record, and expires 45 days later.

Where the record titleholder of an oil and gas lease fails to request reinstatement within 45 days of constructive service of a notice of termination of the lease, reinstatement is not authorized under governing statutory and regulatory provisions, and the termination of the lease becomes final. In these circumstances, BLM properly refuses to approve any pending assignments, as there is no lease interest left to be assigned.

BLM is obligated to notify only the lessee of record about the termination of an oil and gas lease. If the lessee has created an interest in any other person by agreement, the prospective assignee must look to the lessee to provide notice of the termination.

James Dacby, 92 IBLA 231 (June 25, 1986)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil or gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Ann L. Rose, 92 IBLA 308 (June 26, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate an oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

Edward B. Finch, 92 IBLA 330 (June 30, 1986)

RENTALS

Where, following a drawing of simultaneously filed oil and gas lease applications, a first-drawn applicant fails to submit the executed lease agreement and advance rental within 30 days of receipt of notice to do so, the application is properly rejected.

Janet P. Larson, 91 IBLA 151 (Mar. 25, 1986)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office

OIL AND GAS LEASES--Continued

PENALTIES--Continued

administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a class I reinstatement of an oil and gas lease.

Oscar P. Graham, 91 IBLA 398 (Apr. 29, 1986)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of $2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(a), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

J. A. Tenah dba Tenah Oil Co., Barbara P. Sweeney, 92 IBLA 17 (May 6, 1986)

ROYALTIES

The regulation at 30 CFR 241.2 provides that decisions regarding payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

Samathoe Oil Co., 90 IBLA 338 (Jan. 30, 1986)
91 I.D. 6

STIPULATIONS

The Secretary of the Interior has the discretionary authority to require the execution of special stipulations as a condition precedent to issuance of oil and gas leases for land which is located in a national forest in order to protect environmental and other land use values. In the exercise of that authority BLM may establish a reasonable time limit of 30 days from receipt of notice for an over-the-counter lease offeror to submit a signed lease with the required stipulations. Where the offeror does not object to the stipulations, and files them with BLM in advance of a decision rejecting the offer but after the 30-day period allowed for filing, BLM should consider whether the late filing ought not be accepted under the provisions of 43 CFR 1821.2-2(g).

Bill Mathis et al., 90 IBLA 353 (Feb. 26, 1986)

The Bureau of Land Management is not authorized to reject conditions imposed by the United States Forest Service upon acquired land managed by the Forest Service pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (1982). Where an oil and gas lessee objects to provisions of an apparent attempt by the Forest Service to condition the terms of his oil and gas lease on acquired land, agencies of the Department of the Interior may not adjudicate the validity of the challenged conditions.

James T. Chaney, 91 IBLA 183 (Mar. 28, 1986)

OIL AND GAS LEASES--Continued

SUSPENSIONS

The granting of an application for suspension of an oil and gas lease rests in the discretion of the authorized officer. Where, however, the application for suspension does not contain the agreement of the lessee of record assenting to the request, the application does not comply with 43 CFR 3165, and may not be granted.

Lario Oil & Gas Co., 92 IBLA 86 (May 9, 1986)

Where oil and gas leases issued after enactment of the Federal Land Policy and Management Act of 1976, are located within a wilderness study area, are subject to the wilderness protection stipulation prohibiting impairment of wilderness suitability and are denied applications for permit to drill for failure to meet the nonimpairment standard, the denial itself is not a restriction which is tantamount to a suspension under 30 U.S.C. § 209 (1982).

Amoco Production Co. et al., 92 IBLA 333 (June 30, 1986)

TERMINATION

Under 30 U.S.C. § 188(c) (1982), BLM lacks authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

Lucas Robert, 90 IBLA 192 (Jan. 23, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

BLM may properly condition class II reinstatement, under 30 U.S.C. §§ 188(d) and (e) (1982), of a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental upon tender of the required back rental, computed at the increased rate of $5 per acre set forth in 30 U.S.C. § 188(e)(2) (1982), within 60 days after receipt of a notice of termination.

Monica Y. Rowland, 90 IBLA 389 (Feb. 26, 1986)

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Wayne J. Stanley, 90 IBLA 357 (Feb. 27, 1986)

An oil and gas lease on which there is no well capable of production in paying quantities terminates automatically by operation of law where the annual rental is not paid on or before the lease anniversary date. Although an assignment of 100 percent of record title to a portion of the leased lands segregates the assigned portion and the retained portion into separate leases, this is not true of an assignment of operating rights and timely payment of the rental for the entire lease acreage is required to maintain the lease.

Albert J. Tisch, Carl J. Williams, William I. Pedelic, 91 IBLA 187 (Mar. 31, 1986)

TERMINATION--Continued

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely unless the full amount of the rental due is submitted within 20 days after the anniversary date and other requirements are met.

Herbert L. Stiggett, Lois C. Stiggett, 91 IBLA 239 (Apr. 8, 1986)

Where an oil and gas lessee's annual rental payment was postmarked on the Monday following the anniversary date of the lease which fell on the preceding Sunday, the payment was not timely under the provisions of 43 CFR 3108.2-1(a), even though, under the regulation, the lease payment could have been timely received by BLM on the Monday upon which payment was postmarked. Mailing was not made the equivalent of actual payment nor was the anniversary date of the lease changed by the regulation, which permits payment on the next day following a lease anniversary when the office where payment is to be made is closed on the anniversary date.

Nancy Wohl, 91 IBLA 327 (Apr. 17, 1986)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

Reinstatement of a terminated noncompetitive oil and gas lease under sec. 401 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 189(1), (2) (1982), requires payment by the lessee of rental at the rate of $5 per acre as well as reimbursement of administrative costs (up to $500) and the cost of publishing notice in the Federal Register.

Oscar D. Graham, 91 IBLA 395 (Apr. 29, 1986)

A decision rejecting a request by an assignee for approval of a partial assignment of an oil and gas lease will be affirmed where the lease had terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date and the assignee had not tendered the rental required for the lands described in the partial assignment prior to the anniversary date.

Ruth L. Schwegert, 92 IBLA 98 (May 28, 1986)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil or gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Ann L. Rose, 92 IBLA 308 (June 26, 1986)

TERMINATION--Continued

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate an oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

Edgar E. Finch, 92 IBLA 310 (June 30, 1986)

UNIT AND COOPERATIVE AGREEMENTS

Where a producing unit agreement terminates after the conclusion of the primary term of the parent lease and part of the lands in the parent lease are simultaneously committed to a second producing unit, thereby effecting a segregation of the parent lease, the term of the segregated lease without production shall be for so long as oil or gas is produced in paying quantities upon the unitized lease, but not less than 2 years, and so long thereafter as oil or gas is produced in paying quantities on the noncommitted lease.

Conoco, Inc., 90 IBLA 389 (Feb. 28, 1986)

Mexpro Co., 90 IBLA 394 (Feb. 28, 1986)

Where an appellant criticizes a division of a reservoir delineated by Geological Survey on the Outer Continental Shelf on the grounds that various errors resulted in inaccurate allocation of original gas-in-place, and the evidence fails to establish that any substantial error occurred, the reservoir division will be affirmed.

The law of capture, which provides that the owner of a tract acquires title to the oil and gas which he produces from wells drilled thereon, even though part of such oil or gas migrated from adjoining lands, is fully applicable on the Outer Continental Shelf in the absence of a unitization agreement. Where, however, unitization has been ordered, allocation of production to competing tracts should normally be made on the basis of net-acre feet.

Where Geological Survey decides to deviate from straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of a unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS--Continued

Unit agreements involving Federal oil and gas interests are effective as to those interests only upon the approval of the authorized officer. When a Federal lease is in its extended term completes the term prior to approval of a unit agreement, that lease is not subject to extension under 43 CFR 3107.3-1 upon the subsequent approval of the unit agreement.

Lario Oil & Gas Co., 92 IBLA 86 (May 9, 1986)

Where an oil and gas lease is in its extended term by reason of production at the time the lease is segregated by commitment in part to a unit agreement in accordance with 30 U.S.C. § 226(l) (1982), the segregated nonunitized lease will continue in effect by virtue of that production, but for not less than 2 years from the date of segregation.

Anadarko Production Co., 92 IBLA 212 (June 16, 1986)
93 I.D. 246

OUTER CONTINENTAL SHELF LANDS ACT

GENERALLY

The Department may begin presale procedures for a lease sale before the approval of the 5-year schedule on which it is listed.

Whether the Department may Issue a Call for Information & Nominations for Outer Continental Shelf Lease Sale 21, M-36959 (Feb. 10, 1986) 93 I.D. 125

OIL AND GAS LEASES

Where an appellant criticizes a division of a reservoir delineated by Geological Survey on the Outer Continental Shelf on the grounds that various errors resulted in inaccurate allocation of original gas-in-place, and the evidence fails to establish that any substantial error occurred, the reservoir division will be affirmed.

The law of capture, which provides that the owner of a tract acquires title to the oil and gas which he produces from wells drilled thereon, even though part of such oil or gas migrated from adjoining lands, is fully applicable on the Outer Continental Shelf in the absence of a unitization agreement. Where, however, unitization has been ordered, allocation of production to competing tracts should normally be made on the basis of net-acre feet.

Where Geological Survey decides to deviate from straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of a unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

Under sec. 8 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

STATE LAWS

Under sec. 8 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

UNIT PLANS

Where an appellant criticizes a division of a reservoir delineated by Geological Survey on the Outer Continental Shelf on the grounds that various errors resulted in inaccurate allocation of original gas-in-place, and the evidence fails to establish that any substantial error occurred, the reservoir division will be affirmed.

The law of capture, which provides that the owner of a tract acquires title to the oil and gas which he produces from wells drilled thereon, even though part of such oil or gas migrated from adjoining lands, is fully applicable on the Outer Continental Shelf in the absence of a unitization agreement. Where, however, unitization has been ordered, allocation of production to competing tracts should normally be made on the basis of net-acre feet.

Where Geological Survey decides to deviate from straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of a unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

Under sec. 8 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit

OUTER CONTINENTAL SHELF LANDS ACT--Continued

UNIT PLANS--Continued

participant who produced unitized substances in excess of its allocated share.

Sun Oil Co., et al., 91 IBLA 1 (Feb. 28, 1986) 93 I.D. 95

PATENTS OF PUBLIC LANDS

CORRECTIONS

Where one holding a patent from the United States applies to have the patent corrected to eliminate a reservation in accordance with sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), alleging that the purpose for the reservation no longer exists, the application is properly rejected where the record shows the reservation was not erroneously included in the patent on the basis of a mistake of fact.

Bill G. Minton, Marylee Minton, 91 IBLA 108 (Mar. 14, 1986)

EFFECT

Applications for lands to which the title has passed by issuance of a legal patent must be rejected.

R. L. & Vonna Jean Newman et al., 92 IBLA 314 (June 26, 1986)

The effect of an interim conveyance is to convey legal title from the United States. Applications for lands to which the United States no longer holds title must be rejected.

Gale & Erma Doggett et al., 92 IBLA 316 (June 26, 1986)

RESERVATIONS

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert P. Lanier et al., 90 IBLA 293 (Feb. 20, 1986) 93 I.D. 66

BLM properly declares a mining claim null and void ab initio where the land has been reconveyed to the United States with a mineral reservation to the grantor or his predecessor in interest, even though the original conveyance from the United States was pursuant to sec. 3 of the Act of July 27, 1866, 14 Stat. 292 (1866), which expressly excluded mineral lands from the operation of the Act.

Gold-West Industries, Inc., 90 IBLA 372 (Feb. 27, 1986)

PATENTS OF PUBLIC LANDS--Continued

RESERVATIONS--Continued

Removal of rock for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1976), constitutes a trespass because such material was reserved to the United States by the Act.

Barney Rock & Paving Co., 91 IBLA 278 (Apr. 14, 1986) 93 I.D. 179

SUITS TO CANCEL

The Department is barred from initiating action to vacate and annul a patent of public lands 6 years after the date of issuance of the patent, unless the patent was procured by fraud.

Alaska Mining Corp., 90 IBLA 179 (Jan. 15, 1986)

Where lands described in a previously relinquished Native Allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native Allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native Allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

PAYMENTS

GENERALLY

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the State if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co., et al., 91 IBLA 1 (Feb. 28, 1986) 93 I.D. 95

"Tender" placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the

PATENTS--Continued

GENERALLY--Continued

Department to consider the merits of a petition for a class 7 reinstatement of an oil and gas lease.

Oscar D. Stokes, 91 IBLA 399 (Apr. 29, 1986)

PRIVATE EXCHANGES

GENERALLY

A surface-only private exchange undertaken pursuant to sec. 11 of the Relocation Act, 25 U.S.C. § 640d-10(a)(1) (1982), over the objection of the owner of the mineral interest in the private land involved is the exchange does not violate that Act. The Act imposes no legal requirement on the Secretary of the Interior to acquire such interest.

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 640d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchanges, the opportunity to comment, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

PROTESTS

Under certain circumstances a document styled as a protest is properly treated as an appeal. Thus, where prior to completion of a private exchange by BLM, the owner of the mineral interest in the private land involved therein requests that BLM acquire its interest and BLM proceeds to complete the exchange and subsequently deny the request, a protest filed by the owner should be treated by BLM as an appeal of its denial and the case file forwarded to the Board of Land Appeals.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

PUBLIC INTEREST

A BLM decision to proceed with a proposed land exchange of public land containing wetlands and situated within a floodplain pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), as consistent with the public interest, will be vacated and remanded where the record shows that BLM did not consider including in the deed of conveyance a requirement to preserve the beneficial values of the floodplain consistent with Executive Order No. 11988 and BLM floodplain guidelines.

Neiburger Ranches, Inc., et al., 90 IBLA 360 (Feb. 27, 1986)

PUBLIC LANDS

SALES

BLM properly rejects FLO 1613 applications to purchase lands adjoining lands that were not in private ownership or in a pending application on Apr. 7, 1958.

United Methodist Church et al., 92 IBLA 318 (June 26, 1986)

SPECIAL USE PERMITS

The issuance of a special recreation use permit for the 1984 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

Inyo Audubon Society, Citizens for Mojave National Park, 91 IBLA 396 (Apr. 15, 1986)

PUBLIC SALES

APPLICATIONS

BLM properly rejects FLO 1613 applications to purchase lands adjoining lands that were not in private ownership or in a pending application on Apr. 7, 1958.

United Methodist Church et al., 92 IBLA 318 (June 26, 1986)

PREFERENCE RIGHTS

BLM properly rejects FLO 1613 applications to purchase lands adjoining lands that were not in private ownership or in a pending application on Apr. 7, 1958.

United Methodist Church et al., 92 IBLA 318 (June 26, 1986)

RAILROAD GRANT LANDS

BLM properly declares a mining claim null and void ab initio where the land has been reconveyed to the United States with a mineral reservation to the grantor or his predecessor in interest, even though the original conveyance from the United States was pursuant to sec. 3 of the Act of July 27, 1866, 14 Stat. 294 (1866), which expressly excluded mineral lands from the operation of the Act.

Gold-West Industries, Inc., 90 IBLA 377 (Feb. 27, 1986)

RECLAMATION HOMESTEADS

Where BLM reports that land within a reclamation homestead entry is valuable for oil and gas, after satisfactory reclamation final proof has been filed, that report may not be relied upon as a basis for imposition of a mineral reservation unless the Government is prepared to assume the burden, prima facie, that the land is known to be of mineral character at the date of acceptance of final proof. Where BLM issues a decision requiring consent to such a reservation, but the mineral report states the Government will not assume the burden of proving the reservation is proper and the record is unclear whether reservation is

DECLARATORY JUDGMENTS--Continued

proper, the decision will be set aside and the case remanded for action in accordance with 43 CFR 2091.3-3(c)(3).

Valdez Creek, 89 IBLA 318 (Feb. 28, 1986)

REGIONAL CORPORATION SELECTIONS

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), and utilized as a basis for declaring mining claims null and void ab initio, where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

Pursuant to 43 CFR 2653.2(d), the filing of a Native regional corporation selection under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), segregates the selected land from all other forms of appropriation under the public land laws, including the mining and mineral leasing laws. The segregative effect of such an application terminates upon final rejection of the application.

When it is not clear whether a regional corporation selection was made only under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 18, 43 U.S.C. § 1613 (1982) of that Act, a BLM decision declaring certain mining claims null and void ab initio because notation of the selection on the public land records had segregated the land from mining location may be set aside and the case remanded for a determination of the statutory basis for the selection.

Maurice E. DeMont, 91 IBLA 317 (Nov. 15, 1986)

When it is not clear whether a regional corporation selection was made under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 18, 43 U.S.C. § 1613 (1982) of that Act, the case may be remanded for a determination of the statutory basis for the selection.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1611 (1982), thereby rendering mining claims located thereafter null and void ab initio, where neither the Act nor the implementing regulations of the Department provide that the filing of such a selection application segregates the land from other appropriation.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613 (1982), thereby rendering mining claims located thereafter null and void ab initio, in the absence of a master title plat or other land use record entry depicting that the application was filed under that statutory authority.

Nancy Hollingsworth, 92 IBLA 358 (June 30, 1986)

REGULATIONS

GENERALLY

Approval by the Bureau of Indian Affairs of a tax ordinance passed by an Indian tribe is the exercise of its tribal sovereignty does not constitute an agency rule within the meaning of 5 U.S.C. § 551(4) (1982).

Archuleta, Tyrrell & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 94 IBLA 86 (Feb. 24, 1986) 93 I.D. 79

An assessment for failure to file production reports in a timely manner pursuant to 43 CFR 3162.7(b) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied.

Sonat Oil Co., 91 IBLA 197 (Mar. 28, 1986)

Tatex Petroleum Corp., 91 IBLA 252 (Apr. 9, 1986)

The Board of Indian Appeals does not have authority to change a duly promulgated regulation of the Department or to declare it invalid.

David Sohappy, Sr., et al. v. Acting Deputy Asst. Secretary--Indian Affairs (Operations), 93 IBLA 105 (Apr. 8, 1986) 93 I.D. 174

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(f) may be vacated by this Board, in view of the suspension of that regulation and the change in Department policy that such assessments should automatically be levied.

Inco Energy Corp., 92 IBLA 81 (May 27, 1986)

BLM may properly impose liquidated damages pursuant to 43 CFR 3163.3(c) where an oil and gas lessee fails to obtain BLM approval of an application for a permit to drill prior to commencing drilling operations. Where, during BLM's technical and procedural review of an assessment order, 43 CFR 3163.3(c) is amended to reduce assessments to a one-time, rather than a continuing charge, the amended regulation will be applied to the benefit of the affected party, absent any intervening rights which will be affected or countervailing public policy reasons.

Benson-Montin-Greer Drilling Corp., 92 IBLA 92 (May 28, 1986)

An assessment levied pursuant to 43 CFR 3163.3(b) for failure to file a monthly production report in a timely manner may be vacated by this Board, in view of the suspension of that regulation and a change in Department policy that such assessments should automatically be levied.

Burton/Hawks, Inc., 92 IBLA 188 (June 11, 1986)

APPLICABILITY

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 450h-1c (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchange, the opportunity

REGULATIONS--Continued

APPLICABILITY--Continued

to comment, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 290 (Jan. 30, 1986)

FORCE AND EFFECT OF LAW

A Bureau of Land Management instruction memorandum is merely a document for internal use by BLM employees. Such documents are not regulations and have no legal force or effect.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

PUBLICATION

The procedures followed by the Bureau of Indian Affairs in determining an individual's Indian blood quantum are rules within the meaning of 5 U.S.C. § 551(4) (1982) and are required by 5 U.S.C. § 552 (1982) to be published in the Federal Register.

Under 5 U.S.C. § 552(a)(1) (1982) and the Supreme Court's holding in Morton v. Ruiz, 415 U.S. 199 (1974), an individual may not be adversely affected by a rule required to be published in the Federal Register that is not so published.

Morgan Underwood, Sr. v. Deputy Ass't. Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

RES JUDICATA

Where a contractor had the opportunity to include in previous appeals to the Board a challenge to the validity of retainage of funds by the contracting officer, but failed to do so, the Board holds the current appeal, challenging the validity of retainage of funds by the contracting officer under the same contract, to be subject to dismissal under the doctrine of res judicata.

Appeal of C. S. Morton Co., Inc., IBCA-2068 (June 28, 1985) 93 I.D. 259

RIGHTS-OF-WAY

GENERALLY

Whenever the Secretary of the Interior makes any conveyance of land under any of the public land laws, he may reserve a right-of-way for trails within the National Trails System to the extent he deems necessary to carry out the purposes of the National Trails System Act, 16 U.S.C. § 1241 (1982).

The Bureau of Land Management may issue a certificate of allotment subject to a continued right of public access along a segment of the Iditarod National Historic Trail crossing through allotment lands. Such a conveyance is an exercise of the discretion vested in the Secretary pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 - 270-3 (1970).

In the absence of legislative approval of a Native allotment, title to the land in an approved allotment application rests with the United States and does not pass to the Native until the land described therein has been surveyed and a "Native Allotment" issued. Therefore, 25 CFR 169.3, which requires that the Secretary obtain written consent from Indians prior to granting a

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

right-of-way across Indian land, does not apply to approved Native allotment applications prior to survey and issuance of the "Native Allotment."

Edward A. Nicholi, 90 IBLA 277 (Feb. 5, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of non-linear rights-of-way is the comparable lease appraisal.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a showing of error that the appraisal methods used by BLM are incorrect, an appraisal may be rebutted only by another appraisal.

Horizon Communications, 91 IBLA 399 (Apr. 30, 1986)

APPLICATIONS

A BLM decision advising an applicant for a wind energy project of a perceived defect in his application and allowing 30 days to cure the deficiency is interlocutory in nature.

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management to prohibit wind energy development within the Table Mountain Area of Critical Environmental Concern will be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest. An application for a right-of-way for a wind energy project will be rejected where lands described therein are not available for development.

Kenneth W. Bonley, Westwind Electric, Inc., 91 IBLA 172 (Mar. 28, 1986)

In deciding whether to grant a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, which is planned as part of a larger project involving the treatment and exporting of that wastewater for agricultural reuse after storage, which project is subject to funding or authorization by other Federal agencies, BLM is only responsible for assessing the environmental impact of the right-of-way grant.

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to mitigate any significant environmental impact, the Board will, rather than set aside the

APPLICATIONS--Continued

grant, remand the case to BLM for inclusion of appropriate stipulations.

Sierra Club, Inc., et al., 92 IBLA 288 (June 26, 1986)

APPRAISALS

BLM properly requires the municipal holder of a right-of-way for a water treatment plant to pay fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

"Municipal utility." A municipal utility is a political subdivision or agency of a political subdivision which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service.

City of Redding, 91 IBLA 82 (Mar. 11, 1986)

CONDITIONS AND LIMITATIONS

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to mitigate any significant environmental impact, the Board will, rather than set aside the grant, remand the case to BLM for inclusion of appropriate stipulations.

Sierra Club, Inc., et al., 92 IBLA 288 (June 26, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), authorizes the Secretary of the Interior to charge less than fair market value for right-of-way rental. However, a for profit business whose principal source of revenue results from subleasing communication facilities is not entitled to a reduction or waiver of a rental fee based on fair market value merely by providing a service to Government agencies or representatives of Government agencies.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management to prohibit wind energy development within the Table Mountain Area of Critical Environmental Concern will be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest. An application for a right-of-way for a wind energy project will be

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

rejected where lands described therein are not available for development.

Kenneth R. Bosley, Marshall Electric, Inc., 91 IBLA 172 (Mar. 28, 1986)

RULES OF PRACTICE

GENERALLY

While it is true that after a notice of appeal of a BLM decision has been filed with the Board, BLM lacks authority to modify the decision under appeal, BLM is not precluded from undertaking analyses as to the correctness of its original decision. Where the record on appeal includes a re-evaluation by the Bureau completed subsequent to the filing of an appeal concludes that areas previously designated as within a known geologic structure are not so located, such a determination cannot be ignored.

C. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

A document sent certified mail by BLM to a person at his last address of record is considered to have been constructively served on that person at the time of return by the Postal Service of the undelivered certified letter, and such constructive service is equivalent in legal effect to actual service of the document. An oil and gas lessee's last address of record is that stated on the lease application form, unless the lessee has filed written notice of a change of address with the issuing BLM office. Thus, the time for filing a petition for reinstatement of a terminated oil and gas lease begins on the date the notice of termination was returned to BLM as undeliverable after it was sent to the lessee's last address of record, and expires 60 days later.

James Darby, 92 IBLA 231 (June 25, 1986)

APPEALS

Generally

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

Wilderness Society et al., 90 IBLA 231 (Jan. 30, 1986)

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and, thus, is a protest.

Randall J. Gerlach, 90 IBLA 230 (Feb. 24, 1986)

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive to accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.705-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 9 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 9-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside duals and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting soil-cement outside the 8-foot width shown on the

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or the semi-pervious portion of the inclined bank) as slippery or slick.

Riverside General Construction Co., Inc., IBCA-1603-7-87 (Feb. 17, 1988) 95 I.D. 77

Under a dam rehabilitation contract containing unit prices for construction items, where the Government claims it is entitled to a downward equitable adjustment on change order work but fails to offer any persuasive evidence in support of the revised unit prices contended for, the Board finds that the Government has failed to sustain its burden of proof.

A. D. Rossi Corp., IBCA-1923 (Feb. 27, 1986) 93 I.D. 97

Dismissal

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of the notice of appeal is jurisdictional, and failure to file an appeal within the time allowed requires its dismissal.

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal.

Mobil Oil Exploration & Producing Southeast, Inc., 88 IBLA 173 (Jan. 21, 1986)

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with a district office of BLM, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Pluto, Inc., 89 IBLA 106 (Jan. 30, 1986)

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

United States v. Fletcher De Fisher et al., 92 IBLA 226 (June 24, 1986)

APPEALS--Continued

Dismissal--Continued

A notice of appeal must be filed within the time limits provided in 43 CFR 4.411(a). Failure to file an appeal within the time allowed requires dismissal of the appeal.

R. J. & Norma Jean Newman et al., 92 IBLA 378 (June 26, 1986)

Effect of

Under certain circumstances a document styled as a protest is properly treated as an appeal. Thus, where prior to completion of a private exchange by BLM, the owner of the mineral interest in the private land involved therein requests that BLM acquire its interest and BLM proceeds to complete the exchange and subsequently deny the request, a protest filed by the owner should be treated by BLM as an appeal of its denial and the case file forwarded to the Board of Land Appeals.

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

The regulation at 30 CFR 243.2 provides that decisions regarding payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

Marathon Oil Co., 90 IBLA 236 (Jan. 30, 1986)
93 I.D. 6

While it is true that after a notice of appeal of a BLM decision has been filed with the Board, BLM lacks authority to nullify the decision under appeal, BLM is not precluded from undertaking analyses as to the correctness of its original decision. Where the record on appeal includes a re-evaluation by the Bureau completed subsequent to the filing of an appeal concluding that areas previously designated as within a known geologic structure are not so located, such a determination cannot be ignored.

R. E. Willion, 90 IBLA 378 (Feb. 27, 1986)

APPEALS--Continued

Hearings

Where, on appeal, the question is presented whether certain lands were omitted from the original survey because of gross error or fraud in establishing the meander line of a lake, the case may be referred to the Hearings Division for a hearing to develop fully the factual record critical to disposition of such a case.

Lawyers Title Insurance Corp., 92 IBLA 167 (June 6, 1986)

Where lands described in a previously relinquished Native Allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native Allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native Allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 180 (June 30, 1986)

Notice of Appeal

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with a district office of BLM, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Phillips, Inc., 90 IBLA 194 (Jan. 30, 1986)

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and, thus, is a protest.

Randall J. Gerlach, 90 IBLA 338 (Feb. 26, 1986)

Standing to Appeal

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision dismissing his protest under sec. 905(a) (5) (C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest on procedural grounds.

Eugene S. Witt, 90 IBLA 265 (Jan. 31, 1986)

RULES OF PRACTICE--Continued

Appeals--Continued

Standing to Appeal--Continued

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision approving a native allotment application under sec. 905(a)(5) (C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest for procedural reasons.

Eugene S. Witt, 90 IBLA 339 (Feb. 26, 1986)

The intent of the regulations limiting standing to appeal to a party to the case is to afford a rational framework for administrative decisionmaking on the assumption that the initial decisionmaker will have had the benefit of the input of such a party in reaching its decision. Where a party has actively participated in the consideration of an inventory unit for eligibility as a wilderness study area has requested in writing the opportunity to comment on applications for permit to drill (APD's) filed for lands within the unit, and has been recognized by the Bureau of Land Management as a party wishing to have input in the process of adjudicating APD's filed for lands within the unit, it is entitled to notice of the filing of those APD's, and it will be recognized as a party to the case on appeal of decisions granting APD's within the unit.

Utah Wilderness Ass'n, 91 IBLA 129 (Mar. 18, 1986)

A BLM decision advising an applicant for a wind energy project of a perceived defect in his application and allowing 30 days to cure the deficiency is interlocutory in nature.

Kenneth W. Bogler, Westwind Electric, Inc., 91 IBLA 177 (Mar. 28, 1986)

Statement of Reasons

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

United States v. Fletcher Dr Fisher et al., 92 IBLA 226 (June 24, 1986)

Timely Filing

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of the notice of appeal is jurisdictional, and failure to file an appeal within the time allowed requires its dismissal.

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal.

Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173 (Jan. 21, 1986)

RULES OF PRACTICE--Continued

Appeals--Continued

Timely Filing--Continued

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with a district office of BLM, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Phillips, Inc., 90 IBLA 195 (Jan. 22, 1986)

A notice of appeal must be filed within the time limits provided in 43 CFR 4.411(a). Failure to file an appeal within the time allowed requires dismissal of the appeal.

R. L. & Norma Jean Newman et al., 92 IBLA 316 (June 26, 1986)

EVIDENCE

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive to accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

Riverside General Construction Co., Inc., IBCA-1603-7-83 (Feb. 13, 1986) 93 I.D. 27

HEARINGS

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

Where there are disputed issues of fact which will be determinative of the legal issues presented, the Board has the authority, in its discretion, to order a hearing on the matter before an administrative law judge pursuant to 43 CFR 4.415.

E. B. Brooks, Jr., 92 IBLA 282 (June 25, 1986)

PROTESTS

Under certain circumstances a document styled as a protest is properly treated as an appeal. Thus, where prior to completion of a private exchange by BLM, the owner of the mineral interest in the private land involved therein requests that BLM acquire its interest and BLM proceeds to complete the exchange and

PRACTICE--Continued

PROTESTS--Continued

subsequently deny the request, a protest filed by the owner should be treated by BLM as an appeal of its denial and the case file forwarded to the Board of Land Appeals.

Santa Fe Pacific Railroad Co., 90 IBLA 280 (Jan. 30, 1986)

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and, thus, is a protest.

Randall I. Gerlach, 90 IBLA 338 (Feb. 26, 1986)

SEGREGATION

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Hilderbach, 90 IBLA 319 (Feb. 25, 1986)

SMALL TRACT ACT

CLASSIFICATION

Lands classified as available for lease or sale under the Small Tract Act are segregated from all appropriation under the public land laws, including the mining laws, and mineral locations made on such lands are null and void ab initio.

Lands segregated from mineral location by classification under the Small Tract Act remain segregated until administrative action is taken to remove the classification.

Thos. Seal et al., 92 IBLA 9 (Apr. 30, 1986)

SPECIAL USE PERMITS

A special use permit is subject to any special condition or stipulation deemed necessary for protection of public interests, including minimum use requirements. Permit privileges may be canceled if a permittee has failed to satisfy minimum use requirements set forth in the provisions of the permit.

Dan Hatch River Expeditions, 91 IBLA 291 (Apr. 15, 1986)

SPECIAL USE PERMITS--Continued

A special use permit is subject to any special condition or stipulation mandated by Departmental policy and considered by the authorized officer issuing the permit as necessary for protection of public interests, including restrictions against transfer or assignment of permit privileges. Where there are disputed facts determinative of whether or not permit privileges were assigned to a third party, the matter may be referred for a hearing for introduction of testimony and other evidence.

Gordon River & Trails, 91 IBLA 294 (Apr. 15, 1986)

The issuance of a special recreation use permit for the 1986 version of the Paratoo to Texas Motorcycle Race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

Yuma Audubon Society, Citizens for Botany National Park, 91 IBLA 309 (Apr. 15, 1986)

STATE SELECTIONS

Issuance of a patent to a state without mineral reservation removes the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Alaska Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

STATUTES

The purposes of applying FLPMA's filing provisions to claims located before the Act was passed--to rid Federal lands of stale mining claims and to provide for centralized collection by Federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims--are clearly legitimate and, therefore, application of these provisions to claims located prior to FLPMA is permissible.

Thurmar Oil & Mining Co., 90 IBLA 382 (Feb. 26, 1986)

STATUTORY CONSTRUCTION

GENERALLY

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 6804-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 6804-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 10 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

Santa Fe Pacific Railroad Co., 90 IBLA 280 (Jan. 30, 1986)

STOCK-RAISING HOMESTEADS

Removal of rock for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1976), constitutes a trespass because such material was reserved to the United States by the Act.

Barker Rock & Paving Co., 91 IBLA 278 (Dec. 10, 1986)
93 I.D. 199

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

Enforcement

Generally

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during an oversight inspection, OSM may issue an NOV if the state fails to take "appropriate action" to abate the violation within 10 days. An NOV issued by OSM will be upheld where it appears that a state NOV issued in response to the 10-day notice was not the appropriate action to secure abatement in view of the outstanding (uncorrected) state NOV for the same violation dated a year previously.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 198 (June 26, 1986)

ADMINISTRATIVE PROCEDURE

Generally

An appeal of a decision by an Administrative Law Judge which approves a settlement agreement between the party that filed an application for review of issuance of a mine permit pursuant to sec. 518(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(c) (1982), and OSM, which issued the permit, in the absence of consent by the permittee, will be affirmed where the agreement, which includes withdrawal of the application for review, does not adversely affect any of the permittee's interests and the permittee is, therefore, no longer an interested party in the proceedings.

An application for review of issuance of a mine permit filed pursuant to sec. 518(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(c) (1982), will be considered timely filed where the evidence establishes that the receipt for certified mail was postmarked within 30 days of notification to the permittee of the final decision of OSM to issue the permit.

Peabody Coal Co. (Appellant) v. The Hopi Tribe & Office of Surface Mining Reclamation & Enforcement (Appellees), 91 IBLA 49 (Feb. 28, 1986)

Burden of Proof

Where OSM issues a 10-day notice to the State and the State fails to take appropriate action to cause the violation to be corrected, or show good cause for such failure, 30 CFR 843.12(a)(2) requires OSM to reinspect prior to taking any enforcement action. In the case where the violation is a failure to file with the State regulatory authority information concerning blasting, proof that OSM contacted the regulatory authority and was informed that the documentation had not been filed would satisfy the reinspection requirement.

In an application for review proceeding of a notice of violation issued by OSM following 10-day notice to the State, OSM has the burden of going forward to establish a prima facie case as to the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden of Proof--Continued

validity of the notice. As part of that prima facie case, OSM must establish that it reinspected in accordance with 30 CFR 843.12(a)(2). However, the permittee waives any objection to OSM's failure to do so by presenting evidence which establishes the violation.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 23 (May 8, 1986)
93 I.D. 199

BLASTING AND USE OF EXPLOSIVES

Generally

Where OSM issues a 10-day notice to the State and the State fails to take appropriate action to cause the violation to be corrected, or show good cause for such failure, 30 CFR 843.12(a)(2) requires OSM to reinspect prior to taking any enforcement action. In the case where the violation is a failure to file with the State regulatory authority information concerning blasting, proof that OSM contacted the regulatory authority and was informed that the documentation had not been filed would satisfy the reinspection requirement.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 23 (May 8, 1986)
93 I.D. 199

CESSATION ORDERS

Generally

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit under regulation 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 8 (Apr. 30, 1986)

CIVIL PENALTIES

Amount

Mitigating factors such as the diligence and good faith effort of the permittee to effect compliance are properly considered in determining the amount of a civil penalty assessed for a violation under sec. 518(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and 30 CFR 723.15(a). However, where failure of the permittee to abate the violation within the time allowed results in a failure-to-abate cessation order, sec. 518(h) of SMCRA and 30 CFR 723.15(b) provide no authority for mitigation of the statutory minimum penalty of $750 per day on the basis of inability to comply.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 90 IBLA 186 (Jan. 28, 1986) 93 I.D. 1

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CIVIL PENALTIES--Continued

Negligence

Mitigating factors such as the diligence and good faith effort of the permittee to effect compliance are properly considered in determining the amount of a civil penalty assessed for a violation under sec. 518(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and 30 CFR 723.13(a). However, where failure of the permittee to abate the violation within the time allowed results in a failure-to-abate cessation order, sec. 518(b) of SMCRA and 30 CFR 723.17(b) provide an authority for mitigation of the statutory minimum penalty of $750 per day on the basis of inability to comply.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 90 IBLA 186 (Jan. 28, 1986) 93 I.D. 1

ENFORCEMENT PROCEDURES

Generally

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during an oversight inspection, OSM may issue an NOV if the state fails to take "appropriate action" to abate the violation within 10 days. An NOV issued by OSM will be upheld where it appears that a state NOV issued in response to the 10-day notice was not the appropriate action to secure abatement in view of the outstanding (unterminated) state NOV for the same violation dated a year previously.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 320 (June 26, 1986)

ENVIRONMENTAL HARM

Generally

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit. Under regulation 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 4 (Apr. 30, 1986)

FEDERAL LANDS

Permits

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit. Under regulation 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

FEDERAL LANDS--Continued

Permits--Continued

Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 4 (Apr. 30, 1986)

INSPECTIONS

Generally

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during an oversight inspection, OSM may issue an NOV if the state fails to take "appropriate action" to abate the violation within 10 days. An NOV issued by OSM will be upheld where it appears that a state NOV issued in response to the 10-day notice was not the appropriate action to secure abatement in view of the outstanding (unterminated) state NOV for the same violation dated a year previously.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 320 (June 26, 1986)

10-day Notice to State

Where OSM issues a 10-day notice to the State and the State fails to take appropriate action to cause the violation to be corrected, or show good cause for such failure, 30 CFR 843.12(a)(3) requires OSM to reinspect prior to taking any enforcement action. In the case where the violation is a failure to file with the State regulatory authority information concerning blasting, proof that OSM contacted the regulatory authority and was informed that the documentation had not been filed would satisfy the reinspection requirement.

In an application for review proceeding of a notice of violation issued by OSM following 10-day notice to the State, OSM has the burden of going forward to establish a prima facie case as to the validity of the notice. As part of that prima facie case, OSM must establish that it reinspected in accordance with 30 CFR 843.12(a)(3). However, the permittee waives any objection to OSM's failure to do so by presenting evidence which establishes the violation.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 73 (May 8, 1986) 93 I.D. 198

PERMITS

Hearings

An appeal of a decision by an Administrative Law Judge which approves a settlement agreement between the party that filed an application for review of issuance of a mine permit pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), and OSM, which issued the permit, in the absence of consent by the permittee, will be affirmed where the agreement, which includes withdrawal of the application for review, does not adversely affect any of the permittee's interests and the permittee is, therefore, no longer an interested party in the proceedings.

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PERMITS--Continued

Hearings--Continued

An application for review of issuance of a mine permit filed pursuant to sec. 7(e)(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(c) (1982), will be considered timely filed where the evidence establishes that the receipt for certified mail was postmarked within 30 days of notification to the permittee of the final decision of OSM to issue the permit.

Peabody Coal Co. (Appellant) v. The Hopi Tribe & Office of Surface Mining Reclamation & Enforcement (Appellee), 91 IBLA 69 (Feb. 28, 1986)

Temporary Relief

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit. Under regulation 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 6 (Apr. 30, 1986)

PUBLIC HEALTH AND SAFETY

Generally

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during an oversight inspection, OSM may issue an NOV if the state fails to take "appropriate action" to abate the violation within 10 days. An NOV issued by OSM will be upheld where it appears that a state NOV issued in response to the 10-day notice was not the appropriate action to secure abatement in view of the outstanding (unterminated) state NOV for the same violation dated a year previously.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 320 (June 26, 1986)

STATE PROGRAM

10-day Notice to State

Where OSM issues a 10-day notice to the State and the State fails to take appropriate action to cause the violation to be corrected, or show good cause for such failure, 30 CFR 843.12(a)(2) requires OSM to reinspect prior to taking any enforcement action. In the case where the violation is a failure to file with the state regulatory authority information concerning blasting, proof that OSM contacted the regulatory authority and was informed that the documentation had not been filed would satisfy the reinspection requirement.

In an application for review proceeding of a notice of violation issued by OSM following 10-day notice to the State, OSM has the burden of going forward to establish a prima facie case as to the validity of the notice. As part of the prima facie case, OSM must establish that it reinspected in

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE PROGRAM--Continued

10-day Notice to State--Continued

accordance with 30 CFR 843.12(a)(2). However, the permittee waives any objection to OSM's failure to do so by presenting evidence which establishes the violation.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 23 (May 8, 1986)
93 I.D. 199

TEMPORARY RELIEF

Significant, Imminent Environmental Harm

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit. Under regulation 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 6 (Apr. 30, 1986)

SURVEYS OF PUBLIC LANDS

GENERALLY

The Secretary of the Interior is authorized to consider and determine the extent of the public lands. This authority includes the authority to survey parcels conveyed from Federal ownership which border public lands. Where a Government survey of a private claim is challenged, the protestant must establish by clear and convincing evidence the survey is not an accurate portrayal of the lands conveyed.

John D. Carter, Sr. & Verne P. Carter, 90 IBLA 286 (Feb. 13, 1986)

BLM may properly reject a color-of-title application filed pursuant to sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the document relied upon as initiating color of title does not on its face purport to convey the claimed land, regardless of whether a contemporaneous county survey included the land in the conveyance and claimant has subsequently occupied the land.

Dale P. Pattig, 90 IBLA 323 (Feb. 25, 1986)

Where BLM publishes in the Federal Register notice of intent to file a plat of dependent resurvey and omitted lands survey and subsequently, in response to objections, publishes notice in the Federal Register of the staying of the filing stating the plat will not be filed "until the day after all protests have been resolved or subsequent appeals have been decided by the Interior Board of Land Appeals," yet proceeds to file the plat prior thereto and without further notification

GENERALLY--Continued

to the public, on appeal the Board of Land Appeals will vacate such filing.

Lawyers Title Insurance Corp., 92 IBLA 162 (June 6, 1986)

DEPENDENT RESURVEYS

Where BLM publishes in the Federal Register notice of intent to file a plat of dependent resurvey and omitted lands survey and subsequently, in response to objections, publishes notice in the Federal Register of the staying of the filing stating the plat will not be filed "until the day after all protests have been resolved or subsequent appeals have been decided by the Interior Board of Land Appeals," yet proceeds to file the plat prior thereto and without further notification to the public, on appeal the Board of Land Appeals will vacate such filing.

Lawyers Title Insurance Corp., 92 IBLA 162 (June 6, 1986)

OMITTED LANDS

Where BLM publishes in the Federal Register notice of intent to file a plat of dependent resurvey and omitted lands survey and subsequently, in response to objections, publishes notice in the Federal Register of the staying of the filing stating the plat will not be filed "until the day after all protests have been resolved or subsequent appeals have been decided by the Interior Board of Land Appeals," yet proceeds to file the plat prior thereto and without further notification to the public, on appeal the Board of Land Appeals will vacate such filing.

The general rule regarding lands patented according to an official plat of survey showing a meander line along a lake or other body of water is that the actual shore line rather than the meander line is the boundary, the meander line being intended to ascertain the approximate acreage in the fractional subdivision. An exception to this rule arises where lands are omitted from the official plat of survey because of gross error or fraud in establishing the meander line.

Where, on appeal, the question is presented whether certain lands were omitted from the original survey because of gross error or fraud in establishing the meander line of a lake, the case may be referred to the Hearings Division for a hearing to develop fully the factual record critical to disposition of such a case.

Lawyers Title Insurance Corp., 92 IBLA 162 (June 6, 1986)

TAYLOR GRAZING ACT

Departmental regulation 43 CFR 4120.3-3 provides that a permittee or lessee may apply to BLM for permission to modify a range improvement permit issued pursuant to sec. 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315(m) (1982), and, under 43 CFR 4140.1 (b)(7), modification of a range improvement without BLM authorization is a prohibited act. Where, pursuant to a range improvement permit, a livestock operator constructs a stock-watering facility, including steel gates which, when closed, bar access to livestock and wild horses and the operator subsequently installs highway guardrails across the gate openings to discourage or prevent wild horses from gaining access to the watering facilities, while allowing entry to livestock, such installation constitutes a change in the purpose of the improvements originally approved and is a modification of the improvements authorized in the permit. As a result, the operator is required to seek authorization therefor prior to installation.

Joe P. Tallini, Jr., et al. v. Bureau of Land Management, 92 IBLA 380 (June 17, 1986)

TIMBER SALES AND DISPOSALS

Where an environmental assessment fails to consider a clearly relevant alternative to a proposal to clearcut timber, a decision rejecting a protest of the proposed sale must be set aside and the case files remanded for supplementation of the EA to consider the alternative which it failed to study.

State of Wyoming Game & Fish Comm'n, 91 IBLA 364 (Apr. 28, 1986)

TRESPASS

GENERALLY

Removal of rock for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1976), constitutes a trespass because such material was reserved to the United States by the Act.

Harney Rock & Paving Co., 91 IBLA 278 (Apr. 10, 1986) 93 I.D. 179

ASSESSMENT OF DAMAGES

Departmental regulation 43 CFR 9239.0-8 provides that the measure of damages for an unintentional trespass is determined by the laws of the State in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized.

Consistent with Oregon law, damages for an unintentional mineral trespass involving crushed rock may consist of either (1) the royalty value of the mineral or (2) the market value of the severed and crushed rock less the expenses of severing it and crushing it.

Harney Rock & Paving Co., 91 IBLA 278 (Apr. 10, 1986) 93 I.D. 179

Where the record supports the findings by an Administrative Law Judge that BLM conducted a roundup of trespassing animals in a reasonable manner, the costs imposed on the owners were reasonable, and such conduct and costs comport with the applicable regulations, the findings will not be modified on appeal.

John W. Thacker, Tongue Thacker v. Bureau of Land Management, 91 IBLA 356 (Apr. 23, 1986)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970

UNIFORM RELOCATION ASSISTANCE

Generally

Persons required to remove their improvements from acquired lands as a result of termination of special use permits previously issued to them by the Park Service involving those lands are not displaced persons within the meaning of the Relocation Act and the Department's implementing regulations, and, consequently, they are not eligible to receive moving payment benefits under the act.

Persons are not eligible as displaced persons under the Relocation Act and the Department's implementing regulations for moving expenses, or compensation, with respect to removable improvements on lands acquired by the United States from the State of Florida where they had the right or obligation, under terms of a grazing permit from the predecessor in interest to the State of Florida, to remove the improvements upon termination of the permit but failed to do so. Displacement in the circumstances resulted from termination of the permit and not the acquisitions by the State of Florida or the United States.

Uniform Relocation Assistance Appeals of Robert S. Pass, Jr., et al., 8 OHA 179 (Mar. 28, 1986)

WILD FREE-ROAMING HORSES AND BURROS ACT

Where the record supports the findings by an Administrative Law Judge that BLM conducted a roundup of trespassing animals in a reasonable manner, the costs imposed on the owners were reasonable, and such conduct and costs comport with the applicable regulations, the findings will not be modified on appeal.

John W. Thacker, Eugene Thacker v. Bureau of Land Management, 91 IBLA 362 (Apr. 21, 1986)

WITHDRAWALS AND RESERVATIONS

EFFECT OF

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

George T. Frist, 92 IBLA 101 (May 30, 1986)

REVOCATION AND RESTORATION

BLM properly rejects PLO 1613 applications to purchase lands adjoining lands that were not in private ownership or in a pending application on Apr. 7, 1959.

United Methodist Church et al., 92 IBLA 318 (June 26, 1986)

STATE SELECTIONS

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under

WITHDRAWALS AND RESERVATIONS--Continued

STATE SELECTIONS--Continued

sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Perlis J. Strassburg, Wilford D. Strassburg, 92 IBLA 1 (Apr. 30, 1986)

BLM may properly declare a mining claim null and void ab initio where it was located at a time when the land was segregated from mineral entry pursuant to 43 CFR 2627.4(b) by virtue of the filing of a state selection application, and there is no evidence that the claim is an amendment of a location which predates that filing.

Rodney D. Jackson, Vernon F. Griffin, 92 IBLA 87 (May 28, 1986)

WORDS AND PHRASES

"Improvements." As used in sec. 905(a)(5)(C) of ANILCA, the term "improvements" does not carry any special meaning, but rather has its legal meaning in relation to real property. Thus, an improvement must enhance the present value of the land.

Eugene F. Witt, 90 IBLA 329 (Feb. 26, 1986)

"Municipal utility." A municipal utility is a political subdivision or agency of a political subdivision which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service.

City of Redding, 91 IBLA 82 (Mar. 11, 1986)

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a class I reinstatement of an oil and gas lease.

Oscar D. Graham, 91 IBLA 308 (Apr. 29, 1986)

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